

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: MB Docket No. 08-214
HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7709-P
v.

TIME WARNER CABLE, INC.
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7822-P
v.

BRIGHT HOUSE NETWORKS, LLC,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7829-P
v.

COX COMMUNICATIONS, INC.,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7907-P
v.

COMCAST CORPORATION,
Defendant.

Volume 11

Wednesday, April 22, 2009
2:00 p.m.

The Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

BEFORE:

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Chief Administrative Law Judge

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2 (2:00 p.m.)

3 JUDGE SIPPEL: We're on the
4 record.

5 It's two in the afternoon on
6 Wednesday, 22 April, and I extended the
7 recess. It was at the request of counsel, but
8 for good reason I determined, certainly.

9 So who wants to report on what's
10 been going on since this morning?

11 MS. WALLMAN: Your Honor, WealthTV
12 intends to offer --

13 JUDGE SIPPEL: Ms. Wallman.

14 MS. WALLMAN: -- offer the amended
15 testimony of Charles Herring, written direct
16 testimony. The version that we're going to
17 tender as an exhibit reflects cooperative work
18 between Complainants, a significant amount of
19 work by Mr. Feld, with a number of the
20 Defendants' counsel to try to meet their
21 objections.

22 And you can certainly ask the

1 Defendants, but I think we have met their
2 objections. We've heard from them that the
3 version that we're preparing to introduce
4 today is a satisfactory meeting of their prior
5 objections.

6 JUDGE SIPPEL: All right. Well,
7 let's get it marked, and then I'll see if
8 there's any objections.

9 The next number is? We had better
10 check on the number.

11 MS. WALLMAN: Your Honor, we
12 intended to designate this WealthTV No. 144 as
13 substitute for the testimony that was objected
14 to.

15 JUDGE SIPPEL: Okay. That's good.
16 Okay. This will be marked. We will mark this
17 for identification as WealthTV No. 144.

18 And are you moving this into
19 evidence at this time?

20 MS. WALLMAN: Yes, Your Honor.

21 JUDGE SIPPEL: Is there any
22 objection?

1 MR. COHEN: No, Your Honor. Our
2 practice has been for Mr. Herring to be sworn
3 in, but we will not object to the admission
4 once he takes the stand.

5 JUDGE SIPPEL: Well, all right.
6 That has been the practice. I am going to
7 reserve receiving it until he takes the stand,
8 but it's marked as Number 144, and I'm
9 expecting it's going to come into evidence
10 without too much trouble.

11 MS. WALLMAN: Thank you, Your
12 Honor.

13 (Whereupon, the document referred
14 to was marked as WealthTV Exhibit
15 No. 144 for identification.)

16 JUDGE SIPPEL: You have been in
17 the process or you have participated in the
18 process?

19 MR. COHEN: Yes, Your Honor. I
20 mean, a lot of people on this side of the
21 table, really more down toward that side of
22 the table, but, yes, we are.

1 MR. MILLS: Your Honor, we've got
2 a substantially revised draft yesterday from
3 WealthTV. We've all reviewed it. We made
4 some, not very significant, but a number of
5 additional suggestions. We all worked it out,
6 and at this point we are satisfied that it
7 meets the objections that we put in our motion
8 to strike.

9 JUDGE SIPPEL: Anything else to
10 add, Mr. Feld?

11 MR. FELD: I just personally would
12 like to thank the opposing counsel for being
13 willing to turn this around quickly and work
14 cooperatively on this testimony.

15 JUDGE SIPPEL: That happens every
16 day.

17 (Laughter.)

18 JUDGE SIPPEL: So Mr. Herring is
19 now back on the straight and narrow. At least
20 we're hoping so, and we'll see when he comes
21 on the stand and we offer that.

22 So what is the next order of

1 business then?

2 MS. WALLMAN: Well, Your Honor, we
3 did have one other preliminary matter. I've
4 discussed this with Mr. Cohen both before the
5 beginning of the trial, and we had another
6 conversation yesterday. What we'd like to do
7 -- I'll speak for myself, and Mr. Cohen can
8 speak for himself.

9 We'd like to have a little leeway
10 in presenting the written direct testimony,
11 allowing the witness to provide a summary of
12 the testimony. I'd like to ask questions to
13 keep the thing moving on pace and within a
14 timely manner.

15 We had not agreed on a specific
16 number of minutes that would go with such a
17 summary. We had talked, you know, perhaps up
18 to 30 minutes for witnesses with very
19 significant chunks of testimony to summarize,
20 and so we'd like to have some leeway to do
21 that.

22 JUDGE SIPPEL: Well, are you

1 basically asking for 30 minutes of direct,
2 essentially up to 30 minutes?

3 MS. WALLMAN: I am asking for 30
4 minutes in which the witness would summarize,
5 and I would keep him on pace by asking him
6 questions to move him from section to section
7 of his summary.

8 JUDGE SIPPEL: All right. Well,
9 you have to watch out for leading questions.
10 I don't mind you directing him to an area, to
11 a new area, you know. You're finished with
12 Area A, direct your attention to whatever the
13 subject matter is for Area B, but after that
14 he's got to do it pretty much on his own,
15 which -- okay. Anyway, that's about it.

16 In other words, do you know what
17 I'm saying? You can't lead him with
18 questions, substantive questions.

19 I'm sorry?

20 MS. WALLMAN: I hadn't intended to
21 do that. I hope I don't cross the line. I'm
22 just trying to make sure he does get through

1 the summary and doesn't burden the court's
2 time.

3 JUDGE SIPPEL: Well, depending on
4 the witness, it can be a very tough job, and
5 maybe it'll work nice and smoothly. We'll
6 certainly let you try. I'll take it in lieu
7 of -- I don't hear any objections before I --

8 MR. COHEN: No, Your Honor, other
9 than to make clear as we did yesterday that we
10 will object if it strays beyond the scope of
11 the --

12 JUDGE SIPPEL: And it has to do --
13 I'll just take it as a substitute for an
14 opening statement, and certainly all or any of
15 the Defendants can do the same.

16 MS. WALLMAN: Just pressing a
17 little further, Your Honor, there were a
18 number of exhibits on which Your Honor
19 reserved an evidentiary ruling.

20 JUDGE SIPPEL: Oh, yes.

21 MS. WALLMAN: And so it was my
22 intention to show the witness exhibits and to

1 show him some of these reserved exhibits to
2 see whether his testimony does support their
3 admission, which I thought was the purpose of
4 reserving the ruling.

5 JUDGE SIPPEL: Well, we all know
6 why the ruling was reserved. If he's the
7 witness that you want to try and clear that
8 matter up, then the issue is up, but each of
9 them has a little bit of a difference.
10 Essentially it is that the way they were
11 introduced, there was an insufficient
12 foundation laid to bring them in. If he can
13 do it, fine. If he can't, again, that's up to
14 you. If he can't do it, maybe you'll need
15 another witness to do it. Usually it's the
16 witness that has something to do with the
17 document.

18 MS. WALLMAN: I understand, Your
19 Honor.

20 JUDGE SIPPEL: If he was the
21 regular receiver of an E-mail, he should be
22 able to handle that.

1 MS. WALLMAN: Understood, Your
2 Honor. I don't think we're going to stray
3 from that.

4 MR. COHEN: But there was a second
5 part, Your Honor, that we're going to come to,
6 which are these demonstrative what we think
7 are argumentative exhibits, and we may want to
8 voir dire the witness. He certainly wrote
9 them. Whether it's appropriate evidence is
10 something that we addressed in our in limine
11 motion, and our resolution of the written
12 direct statement does not cover that area.

13 JUDGE SIPPEL: When I saw the
14 argumentative glossaries, I knew that there
15 was trouble in River City.

16 But anyway, who wants to start?
17 Are we going to start with a witness or are we
18 going --

19 MS. WALLMAN: That was our
20 intention, Your Honor.

21 JUDGE SIPPEL: Well, let's put a
22 witness on the stand. That's always a good

1 sign.

2 MS. WALLMAN: WealthTV calls

3 Charles Herring.

4 JUDGE SIPPEL: Mr. Herring, step

5 forward please. Can you get around there?

6 MR. HERRING: Yes, sir.

7 JUDGE SIPPEL: You've been in

8 court. So you know the drill. Raise your

9 right hand, please, sir.

10 Whereupon,

11 CHARLES HERRING

12 was called as a witness by counsel for the

13 Claimant/Complainant and, having been first

14 duly sworn, was examined and testified as

15 follows:

16 JUDGE SIPPEL: Please be seated.

17 Do you have your water bottle with

18 you? Are you all set to go?

19 THE WITNESS: Yes, thank you.

20 JUDGE SIPPEL: You may proceed.

21 MS. WALLMAN: I'd like to give Mr.

22 Herring a copy of his amended testimony marked

1 as Exhibit WealthTV.

2 JUDGE SIPPEL: Please hand it up
3 to him.

4 Thank you.

5 I take it you've seen this
6 document and you're quite familiar with it,
7 Mr. Herring?

8 THE WITNESS: Yes, sir.

9 DIRECT EXAMINATION

10 BY MS. WALLMAN:

11 Q Mr. Herring, is that your amended
12 written direct testimony?

13 A Yes, it is.

14 Q Is it signed by you?

15 A It is.

16 MS. WALLMAN: Voir dire?

17 MR. COHEN: No.

18 MS. WALLMAN: I move that the
19 amended written direct testimony be accepted
20 into evidence.

21 JUDGE SIPPEL: I'm going to permit
22 -- well, let me ask Mr. Cohen. Are you going

1 to take the lead on this? I take it you are.

2 MR. COHEN: Yes, Your Honor.

3 JUDGE SIPPEL: Mr. Cohen?

4 MR. COHEN: Yes, sir.

5 JUDGE SIPPEL: Any objection?

6 MR. COHEN: No objection. I
7 assume that he's affirming that he's testified
8 that it's under oath, which she did not ask,
9 I guess.

10 JUDGE SIPPEL: Well, you can ask
11 that question. That's fine.

12 VOIR DIRE EXAMINATION

13 BY MR. COHEN:

14 Q Mr. Herring, is everything in your
15 written statement true?

16 A I believe so.

17 END OF VOIR DIRE EXAMINATION

18 JUDGE SIPPEL: And this is your
19 signature at the end; is that correct?

20 THE WITNESS: Yes, Your Honor.

21 JUDGE SIPPEL: And when did you
22 sign it?

1 THE WITNESS: Today at
2 approximately 12:30.

3 JUDGE SIPPEL: Okay. I don't have
4 a signed copy, but one will catch up with me,
5 I'm sure.

6 Do we have one more copy, by the
7 way? An extra copy? Is it extra? I don't
8 want to take somebody's copy.

9 MR. BECKNER: I have a signed copy
10 here, Your Honor.

11 JUDGE SIPPEL: Well, I'll get --
12 yeah, if you want to.

13 MR. COHEN: Your Honor, why don't
14 I try to take that and give that to Mr.
15 Beckner, and we'll give him yours?

16 JUDGE SIPPEL: You're going to
17 trade?

18 MR. COHEN: Yes.

19 MR. BECKNER: This one is signed
20 in blue ink. So I think I may have the
21 original.

22 JUDGE SIPPEL: BMWs or a Chevy.

1 (Laughter.)

2 JUDGE SIPPEL: Is there an extra
3 unsigned copy around? Does anybody have an
4 extra just for my associate?

5 MR. GONZALEZ: I proved Ms. Gosse
6 with a copy.

7 JUDGE SIPPEL: Okay, all right.
8 That's okay. All right. That finishes my
9 questions.

10 This is identified and received in
11 evidence as WealthTV Exhibit No. 144 on this
12 22nd day of April, 2009.

13 (Whereupon, the document referred
14 to was marked as WealthTV Exhibit
15 No. 144 for identification and was
16 received in evidence.)

17 JUDGE SIPPEL: Okay.

18 BY MS. WALLMAN:

19 Q Mr. Herring, could you please
20 describe your title and responsibilities at
21 WealthTV?

22 A I'm the president and a co-founder

1 of WealthTV. I overlook the distribution,
2 affiliate sales activities, programming, ad
3 sales, among other things.

4 Q Have you tried to sell WealthTV's
5 programming to each of the Defendants?

6 A I have.

7 Q What terms did you offer to each
8 of the Defendants?

9 A We offered them free carriage from
10 launch of our service typically through 2008
11 and some circumstances we've offered even a
12 more lengthy period of free distribution. In
13 some cases we even had a revenue share
14 component, and then reasonable rates after the
15 extended free period.

16 MS. WALLMAN: Your Honor, in this
17 connection, I'd like to refer to a poster size
18 blowup of an exhibit that's previously been
19 entered into evidence.

20 JUDGE SIPPEL: What is the exhibit
21 number?

22 MS. WALLMAN: It's Exhibit 2.

1 JUDGE SIPPEL: Exhibit No. 2.

2 Let's see what it looks like.

3 Thank you.

4 BY MS. WALLMAN:

5 Q How did you pitch WealthTV to each
6 of the Defendants?

7 A On the initial visits what we
8 would do is have a PowerPoint presentation
9 usually with anywhere from about 12 to 15
10 slides. We'd talk about the facilities that
11 we had, the infrastructure, the organization.
12 We'd talk in depth on the target audience,
13 targeted demographics. We'd talk a little bit
14 about some of the programming, and we had a
15 DVD typically with us where we'd actually when
16 available show the programming.

17 Q What happened when you tried to
18 sell the programming to each of the
19 Defendants?

20 MR. COHEN: Your Honor, I'm going
21 to object that the question is vague. I mean,
22 I understand that Ms. Wallman doesn't want to

1 violate your instruction not to lead, which I
2 appreciate, but there's three years of
3 discussions with four Defendants encompassed
4 within each of those questions, what happened,
5 and --

6 JUDGE SIPPEL: Well, let's see how
7 he starts, and maybe we can direct him more
8 specifically.

9 Go ahead. Ask the question.

10 THE WITNESS: Well, a quick
11 summary is we had engaged with the Defendants
12 along with a lot of cable companies in 2004
13 and called on them for three, four years, and
14 we just haven't been able to receive their
15 consideration.

16 JUDGE SIPPEL: That's your
17 estimate, right? I mean, that's how you see
18 it.

19 THE WITNESS: That's how I see it.

20 JUDGE SIPPEL: Okay.

21 BY MS. WALLMAN:

22 Q Did you call on Cox?

1 A We called on Cox, and I can give a
2 summary if you'd like of the activities. We
3 started calling on Cox in 2004.

4 MR. COHEN: Your Honor.

5 JUDGE SIPPEL: Yes.

6 MR. COHEN: If I could object
7 again, I think the witness has to --

8 JUDGE SIPPEL: Yeah.

9 MR. COHEN: -- confine himself to
10 personal knowledge.

11 JUDGE SIPPEL: Yeah. I really,
12 really want this witness to testify in a way
13 that's comfortable for him. However, you do
14 have to direct him a little bit more
15 specifically. We're talking about was there
16 a point at which they talked serious business
17 about a proposal, something like that, but
18 just to ask him in that broad sense, it's not
19 the witness' fault really. He's going to go
20 as he sees fit. it's up to you to control it
21 a bit.

22 MR. COHEN: Your Honor, if I could

1 also clarify --

2 JUDGE SIPPEL: Yes.

3 MR. COHEN: -- my objection,

4 encompassed within the answer of "we" is the
5 company, and this is, of course, part of our
6 original objection. We expect Mr. Herring to
7 testify about meetings that he attended or at
8 least to tell us so that we don't have to have
9 any cross as to when he was present and when
10 he wasn't present.

11 We know he was present at a number
12 of meetings. I don't think that would
13 interfere with his story at all.

14 JUDGE SIPPEL: All right. Let me
15 give the instruction so that we can move.
16 Again, I do not want to interfere with you,
17 with your testimony at all, but if there's a
18 conversation, you were the lead in the
19 conversation. We all know that you and
20 Herring have an identity. We don't need to be
21 told anyway what you're thinking, and in that
22 respect we do have to be told what you're

1 thinking.

2 Again, I apologize. I don't want
3 to interrupt, and I don't want to in any way
4 cause any hard feelings because we're telling
5 you to testify in a way that maybe you didn't
6 intend to, but there are certain ground rules
7 that we just have to follow, and the sooner we
8 get into that glide path the less Mr. Cohen is
9 going to talk.

10 THE WITNESS: I understand. I'll
11 do my best.

12 Our sales group started calling on
13 Cox locations in 2004. I was informed that
14 there was a location, Wichita, Kansas, that
15 was interested in launching WealthTV. I
16 attended the meeting.

17 When I attended the meeting, what
18 I heard from the Cox people is there was a
19 serious interest in launching WealthTV. They
20 wanted to launch WealthTV in digital, in high
21 definition. It had been explained to me
22 before I went to the meeting that they were

1 looking for a one time launch support, which
 2 is a cash payment up front to pay for
 3 marketing efforts when a channel is launched.
 4 I knew when I entered the meeting that the
 5 request was a certain amount.

6 I went, had the meeting with them.
 7 We negotiated launch support, a number of
 8 other things. They represented one individual
 9 there was a vice president of sales and
 10 marketing for the Wichita, Kansas facility.
 11 He indicated that he had the authority and it
 12 was his job responsibility to determine which
 13 channels that they decided to launch. We
 14 worked out details. He said he needed to get
 15 a rubber stamp from corporate. We expected a
 16 launch at that point.

17 JUDGE SIPPEL: You expected a
 18 launch?

19 THE WITNESS: I expected. Thank
 20 you.

21 I expected, based on the
 22 conversations that I heard, that a launch

1 would take place.

2 Some time passed. Nothing
3 happened. In effect, there was no back-and-
4 forth with corporate. I wasn't engaged in
5 back-and-forth, and I know that our sales team
6 was not engaged in back-and-forth, and the
7 agreement never took place.

8 In effect, corporate killed what I
9 thought was going to take place from the
10 Wichita facility.

11 JUDGE SIPPEL: Well, be careful
12 about corporate killed the point. You don't
13 really know that. All you know is that you
14 didn't get what you were wanting to get, and
15 I think we understand what that is.

16 But my question is -- I have
17 another question, too, and again, this is so
18 that the record is clear when we have to write
19 against it in a month or so.

20 When you launch something, what
21 does that really mean?

22 THE WITNESS: When we --

1 JUDGE SIPPEL: To you, what does
2 it mean to you?

3 THE WITNESS: What it means to me
4 is that the channel is exhibited on a 24-7
5 basis on a cable system would define a launch.
6 So in this case, a launch would have taken
7 place if the channel was shown on the Wichita
8 cable system in Kansas.

9 JUDGE SIPPEL: And what would you
10 need? What would need to happen before you
11 can get a launch with a cable company?

12 THE WITNESS: That's a great
13 question. In my experience there's a number
14 of ways to launch. I have actually seen where
15 a cable company will launch with a single page
16 -- single piece of paper.

17 JUDGE SIPPEL: I'm not looking for
18 -- I'm not looking for a term paper on it.
19 It's a business deal. You didn't get the
20 business deal you wanted and you've been using
21 the term "launch" with respect to Cox. What
22 is it that you mean? And what would you need

1 to get to the point where you would get a
2 launch with Cox?

3 THE WITNESS: A launch could be a
4 single piece of paper, both parties signing it
5 saying that they agree.

6 JUDGE SIPPEL: Is that what you
7 were expecting?

8 THE WITNESS: I was expecting
9 something along those lines.

10 JUDGE SIPPEL: Did you propose --
11 did you put a piece of paper in front of any
12 of the officials of Cox or officers of cox and
13 say, "Here's my deal. Here's what I want"?
14 Anything like that?

15 THE WITNESS: I did not.

16 JUDGE SIPPEL: Okay. Did anybody
17 in your group do that?

18 THE WITNESS: Yes, sir.

19 JUDGE SIPPEL: Who would that be?

20 THE WITNESS: Our VP or our AVP of
21 Affiliate Relations at the time.

22 JUDGE SIPPEL: And do we have that

1 document? Is that document in the record, Ms.
2 Wallman?

3 MS. WALLMAN: That document has
4 not been presented by WealthTV.

5 JUDGE SIPPEL: Why not?

6 THE WITNESS: It was not
7 presented.

8 MR. MILLS: I don't now that it's
9 been produced. Have I seen it? A paper that
10 relates to a launch in Wichita?

11 MS. WALLMAN: I'll have to look
12 into it.

13 MR. MILLS: I've never seen such a
14 thing, Your Honor.

15 JUDGE SIPPEL: Mr. Cohen? Anybody
16 aware of this?

17 MR. COHEN: Mr. Mills would have
18 the most knowledge.

19 JUDGE SIPPEL: Does it exist, Mr.
20 Herring?

21 THE WITNESS: There's not a piece
22 of paper that exists. We may have supplied

1 the piece of paper. It's a standard form that
2 they would fill out and we'd fill out. I know
3 that WealthTV, because I've seen the paper,
4 and I believe it is an exhibit, sent a
5 document over to Cox Communications in this
6 time frame to begin the discussions and the
7 negotiations with the corporate group.

8 JUDGE SIPPEL: All right. Well,
9 was that a document that was intended to be
10 signed or was this just an outline of your
11 presentation?

12 THE WITNESS: It was a document
13 with a signature on it. We have used this
14 document many times, and it's referred --

15 JUDGE SIPPEL: All right. You
16 answered my question.

17 Did you actually sign the document
18 or was it one of your officials that signed
19 the document?

20 THE WITNESS: No, we didn't sign
21 it on our side.

22 JUDGE SIPPEL: Your side did not

1 sign.

2 THE WITNESS: I don't believe it
3 was signed on either side. The discussions
4 didn't take place.

5 JUDGE SIPPEL: Okay. Don't get
6 ahead of me. Right now the document is going
7 to be an unsigned document, but it is going to
8 be with respect to a Wichita possibility that
9 you were seeking to get.

10 THE WITNESS: It would be a
11 general agreement with corporate, which would
12 then allow Wichita to launch.

13 JUDGE SIPPEL: Is this a -- I
14 don't want to belabor this now, but was this
15 kind of a boilerplate document that you had
16 and you just reached in and you grabbed it as
17 somebody was walking out the door, or is this
18 something that was prepared for Cox?

19 THE WITNESS: This was a general,
20 very simple term sheet type document that we
21 had used with other cable companies during
22 that time frame.

1 JUDGE SIPPEL: Okay. I don't want
2 to show my ignorance now, but is this one of
3 these cards, one of these what do you call it,
4 cards that are used in negotiations? Do you
5 know what I'm trying to say?

6 THE WITNESS: No, Your Honor.

7 JUDGE SIPPEL: Can anybody help
8 me?

9 MR. FELD: Rate card, Your Honor.

10 JUDGE SIPPEL: Rate card?

11 THE WITNESS: It had the rates on
12 it, but it was a little more than just a rate
13 card.

14 JUDGE SIPPEL: So it was kind of
15 maybe a souped up rate card?

16 THE WITNESS: The intent of it was
17 to be a nonbinding, although it can be used to
18 launch, agreement so that a launch could take
19 quickly and a formalized agreement, much
20 longer, a longer form agreement could follow
21 behind it.

22 JUDGE SIPPEL: Some people call

1 those an agreement in principle.

2 THE WITNESS: Yes.

3 JUDGE SIPPEL: That would work?

4 THE WITNESS: Yes, sir.

5 JUDGE SIPPEL: I'm sorry. Ms.

6 Wallman, go ahead.

7 BY MS. WALLMAN:

8 Q You were recounting your dealings
9 with Cox. Was there anything further with
10 respect to Cox?

11 A Yes. In -- this launch in
12 Wichita, the agreement never concluded, and
13 2004 came and went. In 2005 I secured a visit
14 with the Cox corporate group, including their
15 I believe his title was Senior Vice President
16 of Programming, Bob Wilson. The meeting was
17 scheduled in the June time frame.

18 JUDGE SIPPEL: Of what year now?

19 THE WITNESS: 2005, Your Honor.

20 JUDGE SIPPEL: 2005.

21 THE WITNESS: I wanted to go back
22 and confirm the level of interest and all the

1 facts with the Wichita facility. So I flew
2 back to Wichita in May. I had lunch with the
3 Vice President of Sales and Marketing. I
4 believe his name is Tony Matthews, and a
5 person beneath him, and we sat down. He
6 notified me that he was still very interested
7 in launching an agreement to be secured.

8 I understood that they reached out
9 for corporate. I gathered the information
10 from him over about two hours. I was pleased
11 with what he had to say.

12 I then went to the corporate
13 meeting in 2005 and sat down with two
14 individuals from Cox and one individual from
15 my side. Bob Wilson was one of them, and Pat
16 Esser was the other. I had a presentation
17 with me. Basically what I was trying to do is
18 reengage in some discussion so we could figure
19 out what was needed to conclude an agreement.

20 When I got to a slide showing the
21 level of interest that had been expressed to
22 me from Wichita and other locations, Bob

1 basically said he thought it was not true.

2 Pat made a comment about how sales people

3 exaggerate.

4 JUDGE SIPPEL: Who's pat?

5 THE WITNESS: Mr. Esser with Co.

6 Excuse me. I don't mean to be disrespectful

7 to him.

8 JUDGE SIPPEL: Well, you shouldn't

9 be. You shouldn't be.

10 THE WITNESS: My impression was

11 that they were basically say what I was

12 conveying to them was incorrect. I basically

13 felt they were calling me a liar at that

14 point, and I had just been to Wichita and

15 reconfirmed their level of interest.

16 I was unable to get them to engage

17 in any dialogue regarding a carriage

18 agreement.

19 One other thing that I'd like to

20 point out. In 2006, I started working with a

21 CBS affiliate in the Las Vegas area. The call

22 letters are KLAS, and basically we had worked

1 out an agreement where this broadcaster, CBS
2 broadcaster in the Las Vegas area would carry
3 our feed, and the feed would be combined with
4 their feed, which would ultimately allow
5 WealthTV to be exhibited on the KLAS Las Vegas
6 system.

7 I had a couple of meetings with
8 the president. We worked through details, and
9 when she presented this to Cox, Cox killed the
10 deal. I reached out for the general --

11 MR. COHEN: Your Honor, objection.

12 JUDGE SIPPEL: There is an
13 objection.

14 MR. COHEN: Yes. Your Honor, and
15 again I really do want Mr. Herring to tell his
16 story and will try to minimize the objections,
17 but clearly we're now way into hearsay. The
18 testimony that the witness just gave was that
19 somebody from CBS, not a party, went to meet
20 with Cox, and that Cox killed the deal.

21 JUDGE SIPPEL: All right. Just
22 keep your objection. I'm going to sustain the

1 objection. You've gone far afield. We were
2 talking about the specific situation back in
3 June 2005, I thought, on the Wichita --

4 THE WITNESS: Yes, sir, 2004,
5 2005.

6 JUDGE SIPPEL: I'll call it the
7 Wichita project if that's okay with you. I
8 mean, find anything that you're comfortable
9 with, but in any event, how did that -- well,
10 you're giving us -- you said that Mr. Wilson
11 and who is it, Mr. Esser?

12 THE WITNESS: Mr. pat Esser.

13 JUDGE SIPPEL: They reacted in a
14 certain way that you did not find favorable.
15 So then what happened?

16 THE WITNESS: We concluded the
17 meeting, and unfortunately neither I nor
18 anybody at WealthTV was able to engage in any
19 discussions with them about concluding an
20 agreement.

21 In 2006, in Las Vegas, we were
22 working with a CBS affiliate. Again, it's

1 called KLAS, that would allow the WealthTV 24-
2 7 signal --

3 JUDGE SIPPEL: So this is an
4 unrelated -- I mean this is unrelated to
5 Wichita at least at the outset.

6 THE WITNESS: Yes, it is. It's
7 completely unrelated, except it involves Cox.

8 JUDGE SIPPEL: All right. Now, so
9 we're shifting gears here?

10 MS. WALLMAN: No, Your Honor.
11 This is still dealings with Cox.

12 JUDGE SIPPEL: Yeah, okay, but
13 we're going from Wichita to L.A.

14 MS. WALLMAN: Yes.

15 JUDGE SIPPEL: By the way, where
16 are you located?

17 THE WITNESS: San Diego,
18 California.

19 JUDGE SIPPEL: San Diego. That's
20 below L.A.

21 THE WITNESS: Yeah.

22 MR. MILLS: I think he's in Las

1 Vegas right now.

2 MS. WALLMAN: Las Vegas.

3 JUDGE SIPPEL: Las Vegas?

4 MR. MILLS: I think he's in Las
5 Vegas.

6 THE WITNESS: Yeah, I'm sorry.
7 WealthTV is located in San Diego. The Cox
8 location that I was referring to is located in
9 Las Vegas, Nevada.

10 JUDGE SIPPEL: All right. So you
11 traveled from San Diego to Las Vegas for this
12 meeting.

13 THE WITNESS: Multiple --

14 JUDGE SIPPEL: With Mr. Wilson at
15 all?

16 THE WITNESS: No. Mr. Wilson and
17 Mr. Esser were located in Atlanta and the
18 2004-2005 discussions were during Wichita.

19 JUDGE SIPPEL: So the Wichita
20 discussions with Mr. Wilson, et al., was in
21 Atlanta, Georgia.

22 THE WITNESS: In 2005.

1 JUDGE SIPPEL: 2005.

2 THE WITNESS: Yes.

3 JUDGE SIPPEL: Okay. Thank you.

4 Okay.

5 THE WITNESS: In 2006, these
6 meetings with the Las Vegas CBS affiliate took
7 place in Las Vegas. I met with them at least
8 a couple of times. We worked through terms.
9 We came to an agreement. I was notified that
10 there was an issue. I picked up the phone.
11 I dialed the GM of Cox, Las Vegas. I had met
12 with him two times previously. I had a --

13 JUDGE SIPPEL: Who is this?

14 THE WITNESS: His name is Mr. Leo
15 Brennan, and his title is General Manager,
16 Cox, Las Vegas.

17 I had met with him at least twice
18 previously. I felt that I had somewhat of a
19 business relationship with him where I could
20 pick up the phone and call him.

21 JUDGE SIPPEL: That's irrelevant.

22 Now, you made the phone call. Mr. Brennan

1 talked with you, and what did he say to you
2 with respect to your CBS affiliate?

3 THE WITNESS: At a return call he
4 said that the agreement that Cox, Las Vegas
5 had with the CBS affiliate prevented the
6 launch of another channel, which would be
7 called a multi-cast channel, because it wasn't
8 owned directly by the CBS affiliate. In this
9 case WealthTV wasn't owned directly by the CBS
10 affiliate.

11 So Mr. Brennan informed me during
12 this call that because of how the agreement
13 was structured between his company, Cox, and
14 CBS, WealthTV could not launch with this CBS
15 affiliate as a multi-cast channel.

16 JUDGE SIPPEL: Did you understand
17 that to be Cox's policy or did you understand
18 it to be something else with respect to
19 WealthTV, to your knowledge? Don't guess at
20 this.

21 THE WITNESS: What was clear to
22 me --

1 JUDGE SIPPEL: And how was it made
2 clear?

3 THE WITNESS: From my phone call
4 with Mr. --

5 JUDGE SIPPEL: Brennan?

6 THE WITNESS: -- Theo Brennan,
7 what was made clear to me is that for whatever
8 reason -- and I don't know because that was
9 for him -- but what he told me because of the
10 contractual reason, we weren't going to be
11 able to be a multi-cast feed with the CBS
12 affiliate; that he wasn't going to allow it
13 because in his agreement he said that there
14 was a clause that required any multi-cast
15 channel to be owned by the CBS affiliate,
16 which we were not.

17 He gave me a second reason. The
18 second reason was that he felt that WealthTV
19 would be popular in the Las Vegas area.

20 JUDGE SIPPEL: He said this?

21 THE WITNESS: He said this, and he
22 said that the CBS affiliate wanted to launch

1 down the road a CBS business channel, and that
2 business channel may eventually replace
3 WealthTV, and if it did, he didn't want Cox
4 customers to be upset because they could no
5 longer receive WealthTV.

6 JUDGE SIPPEL: Well, he said --
7 that's -- well, I mean, you're not quoting
8 him, but that's --

9 THE WITNESS: It was definitely
10 what his exact words --

11 JUDGE SIPPEL: But that was the
12 sum and substance of what you understood him
13 to say.

14 THE WITNESS: Yes, Your Honor.

15 JUDGE SIPPEL: And then how did
16 you react to that?

17 THE WITNESS: I thanked him for
18 returning the call and for clarifying, and in
19 my mind there was no reason to continue down
20 this track meeting with the CBS affiliate
21 because it wasn't going to go anywhere. In
22 effect, from my conversation what I perceived

1 is the deal was killed. It wasn't going to
2 progress.

3 JUDGE SIPPEL: All right, all
4 right. Is this -- is this new material or is
5 this material that you --

6 MR. COHEN: No, Your Honor.

7 MR. FELD: It's included in the
8 direct.

9 MR. COHEN: It's material we're
10 familiar with, Your Honor.

11 JUDGE SIPPEL: And did you have a
12 chance to depose on this, too?

13 MR. COHEN: Remember there were no
14 fact depositions, but we'll be prepared to
15 cross-examine.

16 JUDGE SIPPEL: That's right.

17 MR. COHEN: And Cox will present
18 testimony as well.

19 JUDGE SIPPEL: All right. Have
20 you got another subject area or how do you
21 want to handle that?

22 MS. WALLMAN: Three more

1 Defendants.

2 THE WITNESS: I'm glad to talk
3 about the next three Defendants. If you don't
4 mind, I'll give a quick summary on Comcast.
5 I'll try to insure that it's short and
6 straight from my testimony.

7 JUDGE SIPPEL: No name calling.
8 (Laughter.)

9 JUDGE SIPPEL: All right. I have
10 problems with that.

11 THE WITNESS: Yes, Your Honor.
12 I'll try my best.

13 JUDGE SIPPEL: Okay.

14 THE WITNESS: In March of 2004,
15 March 26th, to be precise, I flew to
16 Philadelphia and gave a presentation. As a
17 matter of fact, this slide is directly from
18 the presentation that I gave, and that slide
19 was created by me.

20 JUDGE SIPPEL: This is your
21 Exhibit 2 slide?

22 THE WITNESS: Yes, Your Honor.

1 We went over what we would
2 typically do in an initial visit. From there
3 we called on other systems, and I should
4 clarify that "we" doesn't always include me,
5 but other systems were called upon by our
6 organization.

7 By June of 2000 --

8 JUDGE SIPPEL: And were they
9 working for you, like you hired them in?

10 THE WITNESS: They were reporting
11 directly to me.

12 JUDGE SIPPEL: What kind of thing
13 would this -- what kind of services or
14 expertise would they be providing?

15 THE WITNESS: These were direct
16 employees. They were well compensated
17 employees, making, you know, base salaries of
18 100,000 to a quarter million dollars with
19 extensive experience in the distribution area
20 for a cable company. So one, in particular,
21 for example, worked at Discovery
22 Communications before joining WealthTV, and

1 she at Discovery Communications had
2 responsibilities for U.S. distribution of
3 multiple Discovery channels.

4 JUDGE SIPPEL: All right. Now,
5 these were paid salary employees of your
6 company.

7 THE WITNESS: Yes, direct paid,
8 salaried employees.

9 JUDGE SIPPEL: All right. So what
10 was going on with these people then?

11 THE WITNESS: They were calling on
12 Comcast locations throughout the United
13 States. By June of 2004, with my knowledge
14 and approval, we presented an agreement to the
15 Comcast corporate people. It was an extremely
16 favorable agreement, an extremely long,
17 extended free period. We couldn't -- after
18 providing that, there were no additional
19 discussions. There were no back and forth of
20 any substance.

21 I was informed that the issue was
22 limited legal resources at Comcast for --

1 MR. SOLOMON: Your Honor.

2 JUDGE SIPPEL: Yes.

3 MR. SOLOMON: I'd like to object.

4 This reference is to an exhibit that was
5 rejected during the exhibit testimony about
6 the legal resources. So he's now testifying
7 as to an exhibit that was rejected, hearsay.

8 JUDGE SIPPEL: Ms. Wallman?

9 MS. WALLMAN: It's not offered for
10 the truth of the matter. It's his perception
11 as to what the obstacle was.

12 JUDGE SIPPEL: I'm going to --
13 well, I'm going to --

14 MR. MILLS: Your Honor.

15 JUDGE SIPPEL: Yeah.

16 MR. MILLS: If I could add, it's
17 not that he heard it and it's an impression.
18 He said he was informed. So it's actually a
19 double hearsay.

20 JUDGE SIPPEL: Well, I was going
21 to ask who was doing the informing. Obviously
22 I was going to ask that question, but I want

1 to be careful here.

2 If you're saying anything that you
3 formed a derogatory opinion of about
4 personalities or incidents, I don't want to
5 hear it. I want to hear what happened. I
6 want to hear what you said. I want to hear
7 what somebody you identify said to you about
8 the situation, about what was going on, either
9 somebody in your company or somebody that you
10 spoke -- preferable somebody that you were
11 speaking to right in the room.

12 But if it gets too far afield from
13 that and starts to get to be your reaction to
14 some scuttlebutt or some rumors, that is
15 absolutely of no help to us.

16 THE WITNESS: I'll do my best.

17 JUDGE SIPPPEL: Okay. Now, where
18 do we stand on this question? Do you want to
19 ask him a question, Ms. Wallman?

20 MS. WALLMAN: I do agree with Mr.
21 Solomon that the exhibit referring to this was
22 excluded from testimony.

1 JUDGE SIPPEL: All right. Well,
2 let's not talk about that.

3 MS. WALLMAN: Yes.

4 JUDGE SIPPEL: The subject matter
5 of your question is with respect to your
6 dealings with Comcast.

7 THE WITNESS: Yes, Your Honor.

8 JUDGE SIPPEL: All right. Now,
9 tell me if I'm wrong. So far I've got you
10 that you had some highly paid employees of
11 Wealth were surveying the country. I mean, it
12 was basically a nationwide campaign, if I can
13 call it that.

14 THE WITNESS: That's fair.

15 JUDGE SIPPEL: To contact Comcast
16 individuals around the country. Obviously
17 these would be senior people. Fair?

18 THE WITNESS: Yes, Your Honor,
19 yes.

20 JUDGE SIPPEL: And apparently
21 there was something, a light lit in one of
22 these offices that got the attention of you.

1 What Comcast location was that?

2 THE WITNESS: The corporate group
3 was also being contacted at the same time. I,
4 for example, made a visit in March to the
5 corporate group and presented WealthTV.

6 JUDGE SIPPEL: Okay. Where would
7 that be located now?

8 THE WITNESS: They're in
9 Philadelphia.

10 JUDGE SIPPEL: Philadelphia. So
11 you went to Philadelphia to talk to Comcast's
12 corporate group.

13 THE WITNESS: That's correct.

14 JUDGE SIPPEL: And how far up did
15 you get with the corporate group?

16 THE WITNESS: I was meeting -- I
17 believe their titles are Vice Presidents of
18 Programming.

19 JUDGE SIPPEL: Do you have a name?

20 THE WITNESS: I do. Mr. Alan
21 Dannenbaum.

22 JUDGE SIPPEL: So you met with Mr.

1 Dannenbaum?

2 THE WITNESS: Dannenbaum. I'm
3 going to attempt the spelling.

4 JUDGE SIPPEL: That's all right.
5 We'll get it later.

6 THE WITNESS: And Jennifer
7 Jakowski (phonetic) or Gaiski. Excuse me.

8 JUDGE SIPPEL: All right, and what
9 was the purpose for that meeting?

10 THE WITNESS: The purpose was to
11 provide them with a general overview on
12 WealthTV.

13 JUDGE SIPPEL: Something like
14 Exhibit 2?

15 THE WITNESS: Exactly Exhibit 2,
16 was one of 14 slides that was presented in
17 this meeting.

18 JUDGE SIPPEL: And you did the
19 presentation?

20 THE WITNESS: I gave part of the
21 presentation with the Executive Vice President
22 of Affiliate Relations for WealthTV.

1 JUDGE SIPPEL: And that would be?

2 THE WITNESS: Her name is Donna

3 Thomas.

4 JUDGE SIPPEL: Ms. Thomas. Okay.

5 So you and Ms. Thomas were making this can I

6 call it a pitch?

7 THE WITNESS: That's fair.

8 JUDGE SIPPEL: To Comcast, the

9 people you have described, in Philadelphia.

10 This was in -- now, what is the date on this

11 again?

12 THE WITNESS: March 26th, 2004.

13 JUDGE SIPPEL: That's what I had

14 written, but I wanted to be -- okay, all

15 right. And what happened?

16 THE WITNESS: By June there was --

17 JUDGE SIPPEL: What happened at

18 the meeting?

19 THE WITNESS: We gave a general

20 overview. There was some comments. We had a

21 breakfast meeting. There were some comments

22 at the breakfast.

1 JUDGE SIPPET: Breakfast was --
2 how many meetings? Well, tell me what
3 happened.

4 THE WITNESS: There were two
5 visits during the day. During the first
6 visit, we went over the network, a little bit
7 about the infrastructure, a little bit about
8 the ownership, and focused really on what the
9 network was all about, the demographics, the
10 target market, and that we were utilizing all
11 original programming in order to target this
12 market.

13 There were some comments made, one
14 that I recall fairly well, about how the EVP
15 of Comcast -- this is Jennifer Gaiski --
16 understood what we were trying to do. She
17 found it appealing. She talked a little bit
18 about her personal experiences with flying in
19 private jets.

20 JUDGE SIPPET: Well, that really
21 doesn't make any difference. She talked about
22 something that didn't bear on what you were

1 trying to get across?

2 THE WITNESS: She understood the
3 demographic --

4 JUDGE SIPPEL: Oh, I see.

5 THE WITNESS: -- that we were
6 trying to target with WealthTV.

7 JUDGE SIPPEL: Oh, I see. So
8 private jets would have some significance to
9 it.

10 THE WITNESS: It does because it's
11 one of our shows. We have a series called
12 "Private Jets."

13 JUDGE SIPPEL: All right. Sir?
14 Mr. Solomon.

15 MR. SOLOMON: I object to the way
16 he's saying what she understood. He can say
17 what the discussion was at the meeting.

18 JUDGE SIPPEL: I hear you, and
19 you're right. I'm going to sustain the
20 objection, but I'm going to allow him -- I'm
21 not going to strike the testimony. It's clear
22 what's happening.

1 You've got to be careful. You've
2 got to keep your emotions and your conjectures
3 out of it. If she talked about, you know, her
4 experiences on luxury jets and you've got a
5 program that dovetails with that, that's very
6 relevant, but this other, you know, don't --
7 don't -- just be careful when you go beyond
8 that. Okay?

9 THE WITNESS: I'll do my best.

10 JUDGE SIPPEL: Okay. Well, do it.
11 Try hard.

12 THE WITNESS: By June of 2004 --

13 JUDGE SIPPEL: Well, wait. Are we
14 finished with March? You had breakfast. You
15 started -- the 26th was the meeting, and then
16 the next day you had breakfast?

17 THE WITNESS: We had a -- we
18 started off on the 26th with --

19 JUDGE SIPPEL: With breakfast?

20 THE WITNESS: -- with a breakfast
21 meeting.

22 JUDGE SIPPEL: Okay. Where was

1 that? In Philadelphia?

2 THE WITNESS: In Philadelphia.

3 JUDGE SIPPEL: Was it sponsored by
4 Comcast or did you sponsor it?

5 THE WITNESS: We sponsored it. It
6 was just three of us went to a local breakfast
7 house and gave a pitch over the table.

8 JUDGE SIPPEL: The three being
9 like?

10 THE WITNESS: Donna Thomas,
11 myself, and Jennifer Gaiski, Vice President of
12 Programming, Comcast.

13 JUDGE SIPPEL: Okay, and so you
14 all had breakfast, and what was -- now, so you
15 didn't have your chart at the breakfast.

16 THE WITNESS: We had slides --

17 JUDGE SIPPEL: And that --

18 THE WITNESS: --paper slides,
19 handouts. I actually prefer when I give
20 presentations to do it close to somebody and
21 use the handouts and put them out on the
22 table, but occasionally we would use a

1 computer also and project up onto a wall.

2 JUDGE SIPPEL: At a restaurant?

3 THE WITNESS: We wouldn't do that
4 at a restaurant.

5 (Laughter.)

6 THE WITNESS: Have considered it,
7 but --

8 JUDGE SIPPEL: Can try it over
9 here at the Manor Inn and see what.

10 THE WITNESS: Probably won't go
11 very far.

12 JUDGE SIPPEL: I'm not going to
13 vouch for it. So don't worry.

14 I'm trying to see where this is
15 going. You got -- all right, and so what
16 happened at the end of -- by the end of that
17 breakfast meeting -- about how long did that
18 last?

19 THE WITNESS: Probably about an
20 hour.

21 JUDGE SIPPEL: And at the end
22 where were you? I mean where was the project

1 at that point, you know, good, bad, being
2 plus, minus or what?

3 THE WITNESS: The intent was to
4 give an overview to insure that she understood
5 what the network was about.

6 JUDGE SIPPEL: And you got it --

7 THE WITNESS: To solicit any of
8 the feedback.

9 JUDGE SIPPEL: Did you get it
10 across to her.

11 THE WITNESS: We did, we did.

12 JUDGE SIPPEL: And she was
13 accepting of it, I mean, in the sense that she
14 understood it?

15 THE WITNESS: yes.

16 JUDGE SIPPEL: She was not
17 rejecting anything at that point, or was she?

18 THE WITNESS: That was my
19 impression at least, that she was accepting of
20 it. I was trying my best.

21 JUDGE SIPPEL: Well, you would
22 know that, wouldn't you, if somebody wasn't?

1 THE WITNESS: I have been selling
2 products for a long, long time. I have a
3 pretty good read --

4 JUDGE SIPPEL: Yeah.

5 THE WITNESS: -- when somebody --

6 JUDGE SIPPEL: You're not going to
7 get sucker punched at that stage.

8 THE WITNESS: I wouldn't think so.

9 JUDGE SIPPEL: I wouldn't think
10 so.

11 So okay. So she's listening to
12 you, and where do you go from there?

13 THE WITNESS: I'm going to try to
14 progress quickly here --

15 JUDGE SIPPEL: Thank you.

16 THE WITNESS: -- to paint the
17 picture. We had a subsequent meeting with
18 Alan Dannenbaum giving the same type of
19 overview.

20 JUDGE SIPPEL: He's higher than
21 Ms. Gaiski?

22 THE WITNESS: I don't know. I

1 believe that they were both carrying the exact
2 same title with similar roles that may be
3 working with different types of networks.
4 Sometimes one will specialize in one area.
5 One will specialize in another area and split
6 up the work load.

7 JUDGE SIPPEL: All right. Now,
8 was this the same day as the breakfast?

9 THE WITNESS: Yes.

10 JUDGE SIPPEL: What did you go
11 back to her office with her?

12 THE WITNESS: You know what? I
13 just don't recall whether we followed her back
14 or we went back at a later time.

15 JUDGE SIPPEL: Okay. Well,
16 anyway, the same day.

17 THE WITNESS: Yes, the same day.

18 JUDGE SIPPEL: Now, so the cast of
19 characters was Mr. Dannenbaum. Was she at the
20 meeting also?

21 THE WITNESS: I don't believe she
22 was, but I'm not positive. If she was, I

1 don't think she stayed in the meeting the
2 entire time. What I recall is Mr. Dannenbaum.

3 JUDGE SIPPEL: All right. Now,
4 after the breakfast did she say, "I'm going to
5 set something up for you with Mr. Dannenbaum,"
6 or was Mr. Dannenbaum on your agenda?

7 THE WITNESS: He was already on
8 the agenda.

9 JUDGE SIPPEL: So you knew you
10 were going to talk to her first and then him
11 second.

12 THE WITNESS: Yes, and she had a
13 conflict if I recall correctly.

14 JUDGE SIPPEL: Okay, and had she
15 briefed Mr. Dannenbaum about the breakfast?
16 Do you know?

17 THE WITNESS: I do not know.

18 JUDGE SIPPEL: Okay. Take it from
19 there.

20 THE WITNESS: By June --

21 JUDGE SIPPEL: Well, what happened
22 in March? We're still on the 26th. What

1 happened?

2 THE WITNESS: The meeting just --
3 we concluded the meeting. We achieved our
4 objective, which was notifying them about the
5 network, talking about the demographics, what
6 the network was all about, the programming and
7 such.

8 By June of that year --

9 JUDGE SIPPEL: Well, wait a
10 minute. How long did you meet Mr. Dannenbaum?

11 THE WITNESS: I don't recall.
12 From my experience usually --

13 JUDGE SIPPEL: No, no, no, no, no.
14 I don't want that.

15 THE WITNESS: Okay. I don't
16 recall.

17 JUDGE SIPPEL: You don't recall,
18 but you did go up to his office and you met
19 with him or the executive offices of -- well,
20 you tell me.

21 THE WITNESS: Yes, yes, the
22 executive offices I met with.

1 JUDGE SIPPEL: And was it -- was
2 it a short meeting, regular meeting, long
3 meeting?

4 THE WITNESS: I don't recall. We
5 had --

6 JUDGE SIPPEL: Okay. That's your
7 answer. All right. Do you want to add
8 something to that? I'm sorry.

9 THE WITNESS: We had 14 slides
10 with us. This presentation usually takes half
11 an hour, maybe a little longer.

12 JUDGE SIPPEL: Did you make it?

13 THE WITNESS: We made the
14 presentation twice and concluded the
15 presentation and I think we left the -- we
16 achieved what we wanted to achieve.

17 JUDGE SIPPEL: All right, and how
18 was Mr. Dannenbaum's attitude toward you at
19 that time, as best you could discern it?

20 THE WITNESS: I believe the best I
21 recall is it was professional. I don't recall
22 any specific comments one way or the other.

1 I think he was absorbing the information or my
2 perception was he absorbed the information.

3 JUDGE SIPPEL: Okay, and that --
4 okay. So then what happened next?

5 THE WITNESS: By June --

6 JUDGE SIPPEL: Of 2004.

7 THE WITNESS: -- of 2004 our sales
8 force communicated to me, and I had
9 conversations with our direct employees, but
10 we felt there was enough interest to go ahead
11 and provide an agreement to Comcast.

12 JUDGE SIPPEL: Well, okay, okay.
13 Now, let's back up a little bit on that. Your
14 sales force, and who would be the highest on
15 the sales force?

16 THE WITNESS: At the time it was
17 Donna Thomas.

18 JUDGE SIPPEL: Okay. Now, you've
19 already told us. What is her -- I'm going to
20 ask it again.

21 THE WITNESS: She was an Executive
22 Vice President of Affiliate Relations,

1 Affiliate Sales.

2 JUDGE SIPPEL: Okay. Now, and who
3 else was at the high level, was with her? You
4 just kind of said the sales people did this
5 and came back to you.

6 THE WITNESS: In addition to
7 Donna, below her there were three affiliate
8 sales people, all pretty seasoned people that
9 would cover either parts of the country or
10 operators.

11 JUDGE SIPPEL: Okay. Now, so how
12 did -- what was your dealings with comcast up
13 until that point, between March 26th and this
14 what you're testifying to about something
15 happening in June? Were you on the phone with
16 people? Were you --

17 THE WITNESS: I had very little
18 dealings. I don't recall any dealings that I
19 had between March 26th and June.

20 JUDGE SIPPEL: No phone calls.

21 THE WITNESS: No.

22 JUDGE SIPPEL: You didn't make any

1 that you --

2 THE WITNESS: No.

3 JUDGE SIPPEL: And you didn't get
4 any.

5 THE WITNESS: Not that I recall.

6 JUDGE SIPPEL: Well, if it was a
7 significant call, you're remember. If it was
8 a significant call, you would recall it,
9 wouldn't you?

10 THE WITNESS: I would believe so.

11 JUDGE SIPPEL: Okay. Now, then so
12 tell us what happened.

13 THE WITNESS: Based on my
14 conversations with our direct employees, we
15 felt --

16 JUDGE SIPPEL: That would be Donna
17 Thomas primarily?

18 THE WITNESS: That would be
19 primarily Donna Thomas. We felt it was
20 appropriate to supply an agreement to Comcast
21 to kick off discussions and work through an
22 agreement and see the level of interest.

1 JUDGE SIPPEL: Did she really --
2 did she feel it was ready, that Comcast was
3 ready for negotiations at that point?

4 THE WITNESS: She felt --

5 JUDGE SIPPEL: That we're talking
6 about?

7 THE WITNESS: She conveyed that to
8 me, yes.

9 JUDGE SIPPEL: What were the words
10 that she used? Can you remember what? Not
11 the quote, but what words was she using?

12 THE WITNESS: I don't know the
13 exact words.

14 JUDGE SIPPEL: Right.

15 THE WITNESS: I know that there
16 were visits made by our staff to certain
17 areas. I know they reported to me what those
18 areas said, and we felt that we were in the
19 process at a point where it was appropriate to
20 send out an agreement.

21 We did that. It was a very
22 favorable agreement.

1 JUDGE SIPPET: Wait a minute. We
2 did what? Now, you've got to get away from
3 that.

4 THE WITNESS: Yeah.

5 JUDGE SIPPET: Who did what? Who
6 did what? When did -- did she actually say,
7 "It's time" -- well, I'm not going to put
8 words in your mouth.

9 What did she -- what did she say
10 to you that prompted you to say -- to direct
11 it?

12 Did you direct that there be an
13 agreement put together? Did you direct that
14 or did you -- how did that come about?

15 THE WITNESS: No, I didn't direct
16 it. At the time, Donna was reporting back to
17 me on the activities that she and her staff
18 were having with the various Comcast
19 locations. She thought she was at the process
20 where there was enough support that it made
21 sense to provide an agreement to see if we
22 could work through terms with Comcast.

1 I sat down. We talked about the
2 type of agreement. We put together a very
3 favorable proposal, and it was conveyed out to
4 Comcast.

5 JUDGE SIPPEL: Well, where would
6 it be -- where was she -- where was it to be
7 presented or where was it ultimately
8 presented?

9 THE WITNESS: I believe it was
10 presented to Mr. Alan Dannenbaum.

11 JUDGE SIPPEL: So that would be in
12 Philadelphia?

13 THE WITNESS: In Philadelphia.
14 He's out of Philadelphia.

15 JUDGE SIPPEL: Is there
16 correspondence? Is there anything in the
17 record that reflects that?

18 THE WITNESS: I believe so.

19 JUDGE SIPPEL: Do you have
20 exhibits on that, Ms. Wallman? I mean, I'm
21 not asking you to name them, but do we have
22 exhibits on that?

1 THE WITNESS: I need to check my
2 exhibits. We did have some material. Some of
3 it has been excluded from exhibits. So I'll
4 have to check.

5 MR. SOLOMON: I'll wait for Ms.
6 Wallman. I'm not sure there were any exhibits
7 that weren't excluded that related to this.

8 JUDGE SIPPEL: All right. Well,
9 we'll get to that. We'll get to that.

10 I don't want to comment on what
11 you said, but it came to the point, based on
12 what she told you, "she" being Donna Thomas,
13 that all of a sudden somebody got a bright
14 light and said, "This is time to put together
15 a negotiating document," basically a proposed
16 agreement.

17 THE WITNESS: The start of one,
18 proposed terms and see if a term sheet can be
19 worked through.

20 JUDGE SIPPEL: Did she -- did she
21 say that somebody at Comcast said they wanted
22 to see an agreement or, you know, what

1 prompted -- that's a significant move, it
2 seems.

3 THE WITNESS: It was and it was an
4 early move. There was a lot of -- Donna
5 communicated to me that she, in one case
6 myself, and other direct employees of WealthTV
7 were making these visits. There was enough
8 interest in our high definition channel by the
9 time we launched on June 1st, 2004, that she
10 felt it was time to provide terms to begin a
11 negotiation process to conclude an agreement.

12 JUDGE SIPPEL: Well, don't you
13 have to have something more in hand than that?
14 I mean, don't you have to be at a point where,
15 you know, you're talking agreements in
16 principle in a verbal conversation and they
17 say, "Well, okay. Why don't you make the
18 first pitch? You put something together and
19 I'll take a look at it?

20 I mean, go ahead.

21 THE WITNESS: Your Honor, maybe --
22 I just want to make sure there's not a

1 difference in what I think the process was at.

2 JUDGE SIPPEL: No, you have to be
3 the one that --

4 THE WITNESS: She was providing --

5 JUDGE SIPPEL: -- tells us what
6 happened.

7 THE WITNESS: She was providing at
8 that point proposed terms.

9 JUDGE SIPPEL: Who was she
10 providing this to, to Dannenbaum?

11 THE WITNESS: Yes.

12 JUDGE SIPPEL: And then she was
13 getting back to you by phone?

14 THE WITNESS: She was verbally
15 communicating back to me. Her office was a
16 matter of feet away from mine.

17 JUDGE SIPPEL: Well, how does she
18 do it? Does he -- she doesn't shout out the
19 door.

20 THE WITNESS: No.

21 JUDGE SIPPEL: Does she pick up a
22 phone? Does she send you an E-mail or --

1 THE WITNESS: Generally, because
2 we were so close, we'd sit down and we would
3 talk and have a discussion. Occasionally, if
4 she was out on the road, we'd do it via phone.

5 JUDGE SIPPEL: Was there a series
6 of E-mails on this or anything to piece it
7 together?

8 MR. COHEN: Your Honor, if I may -
9 -

10 JUDGE SIPPEL: Go ahead.

11 MR. COHEN: -- which is important
12 to the story, there was a declaration filed by
13 Mr. herring today.

14 JUDGE SIPPEL: I saw it.

15 MR. COHEN: Yes. So Mr. herring
16 does not have any E-mails before June of 2006
17 on his own computer. I think the declaration
18 should speak for itself. Mr. Herring should
19 explain it, but I think that, you know, if
20 we're going to -- you're talking about E-mails
21 from that time period. That's important to --

22 JUDGE SIPPEL: Is this a good time

1 to go into the declaration? Are you going to
2 try to -- are you going to mark it as an
3 exhibit and offer it?

4 MS. WALLMAN: I have not planned
5 to do that, but I can do that.

6 JUDGE SIPPEL: We've got a gap.
7 We've got a gap.

8 MS. WALLMAN: Well, the --

9 JUDGE SIPPEL: If this explains
10 the gap or you think it explains the gap, you
11 ought to talk about it, it seems to me.

12 MS. WALLMAN: We can certainly
13 talk about it.

14 JUDGE SIPPEL: Well, I'm not
15 talking about a chat. I mean, you know.

16 (Laughter.)

17 JUDGE SIPPEL: We're going to try
18 and pin it down.

19 MS. WALLMAN: I understand, Your
20 Honor. We don't --

21 JUDGE SIPPEL: I'm sorry. I'm not
22 trying to be, you know, curt or anything.

1 Please, go ahead.

2 MS. WALLMAN: If you could go off
3 the record for a moment so I could find it.

4 JUDGE SIPPEL: Yes, let's go off
5 the record. Sure.

6 (Whereupon, the foregoing matter
7 went off the record at 2:58 p.m.
8 and went back on the record at
9 3:00 p.m.)

10 JUDGE SIPPEL: Okay, Mr. Herring.
11 You have provided us with a -- executed on
12 April the 18th -- your declaration with
13 respect to certain matters concerning WealthTV
14 documents. Do you have the declaration in
15 front of you?

16 THE WITNESS: Yes, Your Honor.

17 JUDGE SIPPEL: Can you tell me --
18 just explain just in a general way -- what
19 does it pertain to?

20 THE WITNESS: It pertains to some
21 issues I've had with computers and why I've
22 lost some data up to about 2006 on my

1 computers.

2 JUDGE SIPPEL: And that would
3 relate to communications between you and Donna
4 Thomas in this June 2004 situation you've
5 testified to.

6 THE WITNESS: To a small extent it
7 would, but most of the communications I recall
8 as primarily being verbal, over the phone.

9 JUDGE SIPPEL: All right.

10 THE WITNESS: But we didn't
11 communicate a lot via E-mail.

12 JUDGE SIPPEL: Okay. That's all
13 right. I hear you.

14 Let's have this -- Ms. Wallman,
15 I'm going to turn this over to you.

16 MS. WALLMAN: Yes.

17 JUDGE SIPPEL: Do you have a
18 number that we can identify this as?

19 MS. WALLMAN: It would be WealthTV
20 151.

21 JUDGE SIPPEL: WealthTV No. 151
22 for identification. Would you like to offer

1 it at this time or let's see.

2 Are you going to object to this at
3 this time?

4 MR. COHEN: Your Honor, I think we
5 would want to do a voir dire with respect to
6 this document and maybe we ought to reserve
7 this for cross so that you can continue to
8 hear the story and not go off on a tangent.

9 JUDGE SIPPEL: That's fine.
10 That's fine.

11 MR. COHEN: If that's acceptable
12 to the Court.

13 JUDGE SIPPEL: Yeah, that's very
14 acceptable. It's a good idea.

15 WealthTV No. 151, it's identified
16 as -- Mr. Herring has identified it as
17 WealthTV's Exhibit 151, and it will be -- it
18 will be -- its admissibility will be ruled on
19 at or after cross-examination.

20 (Whereupon, the document referred
21 to was marked as WealthTV Exhibit
22 No. 151 for identification.)

1 JUDGE SIPPEL: You may proceed,
2 Ms. Wallman.

3 MS. WALLMAN: I'm not sure exactly
4 how to handle this, Your Honor, but lest Your
5 Honor have undue concern that that entire
6 period is lost, the declaration does speak to
7 a particular way in which some of those E-
8 mails may not be lost to the world.

9 JUDGE SIPPEL: Well, the document
10 will speak for itself in that respect. So I
11 don't want to waste time or put you in a
12 position where you're going through an effort
13 that really might not -- that you're
14 uncomfortable with or that doesn't need to be
15 done.

16 Why don't we leave it at that
17 basis? You've offered it into evidence.

18 MS. WALLMAN: yes.

19 JUDGE SIPPEL: For purposes of
20 what? What's the relevance of this document
21 to your case?

22 MS. WALLMAN: It may help to

1 explain whether there is a gap in the business
2 records, the E-mails of Mr. Herring that would
3 be relevant to this period.

4 JUDGE SIPPEL: Well, are you
5 questioning it? You're using some
6 subjunctives. Isn't it true that there
7 definitely is a gap?

8 He said there's a gap. You told
9 me there's a gap. Everybody's telling me
10 there's a gap.

11 MS. WALLMAN: Mr. Herring lost
12 some E-mails, but it has been his practice to
13 copy another person in this company routinely
14 on those E-mails.

15 JUDGE SIPPEL: Okay.

16 MS. WALLMAN: Those E-mails were
17 searched --

18 JUDGE SIPPEL: Yes.

19 MS. WALLMAN: -- as part of the
20 production. So at the end of the day, there
21 may be no substantive reason to be concerned
22 that the E-mails have vanished.

1 JUDGE SIPPEL: All right. Hold on
2 just a second.

3 MR. COHEN: Your Honor, I mean,
4 this is what I was hoping to avoid. I think
5 it's very different to say it's my practice
6 and another thing to swear under oath that, in
7 fact, we have all of the E-mails, and I don't
8 want to engage in extended argument. I think
9 the record would be advanced by going back to
10 the Comcast discussions. We'll come back to
11 this on cross-examination.

12 JUDGE SIPPEL: That's what I'd
13 like to do. I mean, the document speaks for
14 itself. We know you've stated your position.
15 You've stated actually it's your client's
16 position.

17 MS. WALLMAN: Correct.

18 JUDGE SIPPEL: And Mr. Herring has
19 stated his position, and then we're going to
20 get cross on this. So I'm prepared to just
21 leave it at that. You do as you -- you go
22 forward as you see fit right now.

1 Do you want to go back to his
2 direct?

3 MS. WALLMAN: Yes. I'm satisfied
4 with handling it that way, and I believe Mr.
5 Herring was in the process of recounting some
6 things that happened to Comcast and that's
7 what I --

8 JUDGE SIPPEL: All right. That's
9 where we're going to go.

10 MS. WALLMAN: Okay.

11 JUDGE SIPPEL: We're back to June
12 2004 with Donna Thomas.

13 MS. WALLMAN: Yes.

14 JUDGE SIPPEL: All right. Sir?

15 THE WITNESS: These discussions,
16 it was reported back to me from Donna Thomas
17 that the reason discussions couldn't take
18 place to work through an agreement --

19 MR. SOLOMON: Your Honor, I would
20 like to object, I guess, conditionally to the
21 extent that these reports from Donna Thomas
22 relate to any of the -- there's one E-mail

1 that was rejected that was purporting to be an
2 E-mail that had what appeared to be altered,
3 and that if he's simply trying to get into
4 evidence information in an E-mail from Donna
5 Thomas, then that would be an appropriate --
6 I don't know where he's heading, but I wanted
7 to make that comment.

8 JUDGE SIPPEL: All right. The
9 term "reports" means a lot of things to a lot
10 of people. It could be an oral report. It
11 could be a written report. It could be a
12 handwritten note. It could be an E-mail note.
13 It could be, you k now, a hand signal. I
14 don't know.

15 The point is that something
16 convinced you if I'm right -- tell me if I'm
17 right now -- that it was time to put something
18 down in writing and offer it to Comcast.

19 THE WITNESS: Yes, direct
20 communication in person, back and forth with
21 our direct employee.

22 JUDGE SIPPEL: Wait. Direct

1 communication between Donna Thomas and
2 Comcast.

3 THE WITNESS: Between Donna Thomas
4 and me --

5 JUDGE SIPPEL: Okay.

6 THE WITNESS: -- and what she told
7 me that I felt that her opinion to put
8 something in front of them seemed reasonable.

9 JUDGE SIPPEL: All right. Did you
10 consider picking up the phone or did you, in
11 fact, pick up the phone or something like that
12 or write an E-mail to Mr. Dannenbaum or
13 somebody at his level over in Comcast to see
14 if they were set to go?

15 THE WITNESS: I did not.

16 JUDGE SIPPEL: Why wouldn't you do
17 that, if I can ask?

18 THE WITNESS: We had direct
19 employees, people working for us that did just
20 that. I believe there's documents that will
21 show that.

22 JUDGE SIPPEL: Well, you know, I'm

1 not interested in the chain of that kind of --
2 I'm just saying that you're running -- this is
3 your show, right? I mean, this is your
4 company. You're really it --

5 THE WITNESS: Yes.

6 JUDGE SIPPEL: -- isn't that
7 correct?

8 THE WITNESS: Yes.

9 JUDGE SIPPEL: So --

10 MS. WALLMAN: Your Honor, Your
11 Honor.

12 JUDGE SIPPEL: Yes, ma'am.

13 MS. WALLMAN: I think he just
14 testified that he direct employees, several of
15 them, who --

16 JUDGE SIPPEL: Yeah, but they're
17 employees. Employees are not bosses. I mean,
18 they're not bosses of the boss. Do you see
19 what I'm saying?

20 MS. WALLMAN: Well, not exactly,
21 Your Honor.

22 JUDGE SIPPEL: All right.

1 MS. WALLMAN: He runs a company.

2 JUDGE SIPPEL: Yeah.

3 MS. WALLMAN: It's not just him.

4 JUDGE SIPPEL: He runs the
5 company.

6 MS. WALLMAN: Yes, Your Honor.

7 JUDGE SIPPEL: He delegates
8 certain responsibilities --

9 MS. WALLMAN: Correct.

10 JUDGE SIPPEL: -- to certain
11 people.

12 MS. WALLMAN: Correct, Your Honor.

13 JUDGE SIPPEL: But this is the --
14 an agreement like this is the creme de la
15 creme. I mean this is it, right? I mean,
16 this is it.

17 THE WITNESS: It would be a very,
18 very important one to get going, yes.

19 JUDGE SIPPEL: And you wouldn't
20 want to pick up the phone and start maybe
21 taking over a little bit directly on your
22 negotiations?

1 THE WITNESS: No, because I didn't
2 have the relationships with them. I didn't
3 know them from past dealings. I met them, I
4 believe, once or twice at this point. I
5 recall one meeting.

6 You always want to put your best
7 foot forward, and in this case I didn't think
8 I was the right one to do it.

9 JUDGE SIPPEL: All right. That's
10 a business reason. All right. So then what
11 happened?

12 THE WITNESS: It was reported back
13 to me from Donna Thomas verbally, due to a
14 conversation her and I had, when I would ask,
15 "What is the state? Where are we at? What do
16 we need to do? What are the next steps?" that
17 due to legal resources is what she told me.

18 JUDGE SIPPEL: Careful what you
19 say now. Do you remember this exactly is this
20 how she told you?

21 THE WITNESS: She told me due to
22 legal resources --

1 MR. COHEN: Your Honor, I have a
2 separate problem. Ms. Thomas --

3 JUDGE SIPPEL: Well, we're getting
4 an objection.

5 MR. COHEN: It's an objection.

6 JUDGE SIPPEL: I'm sorry to
7 interrupt you, but go ahead.

8 MR. COHEN: Your Honor, Ms. Thomas
9 is not here. So we --

10 JUDGE SIPPEL: Well, is she going
11 to be a witness?

12 MR. COHEN: No.

13 JUDGE SIPPEL: Why not?

14 MR. COHEN: Well, I believe she's
15 a former employee. You'll have to ask Ms.
16 Wallman. She's not our witness. So you know,
17 I realize the witnesses responded to Your
18 Honor's question. So I --

19 JUDGE SIPPEL: Nobody has called
20 her as a witness.

21 MR. COHEN: No.

22 JUDGE SIPPEL: Or nobody has tried

1 to call her as a witness?

2 MS. WALLMAN: No, Your Honor.

3 MR. COHEN: Your Honor, I think to
4 the extent that Mr. Herring is offering for
5 the truth, which he clearly is, what Ms.
6 Thomas claims was told to her by Comcast, we
7 have a hearsay problem. If it was told to Mr.
8 Herring, it would be admissible as an
9 admission, but it is a second hand matter.
10 It's hearsay and it's hearsay of the worst
11 kind.

12 MR. SOLOMON: And in addition to
13 hearsay, Your Honor, it's also objectionable
14 because it's beyond the scope of his written
15 direct. They had an exhibit that they
16 attempted to put in that purported to be an E-
17 mail that was rejected. Written direct
18 doesn't discuss this issue.

19 So he's now saying things even in
20 the amended written direct that go beyond the
21 scope. So direct testimony change --

22 JUDGE SIPPEL: Well, here's the

1 difficult. Here's the difficulty. I'm trying
2 to figure out -- I'm trying to find out what
3 is his -- he's at this point, just this
4 critical point.

5 You know what we ought to do? We
6 ought to -- let's go off the record. Would
7 you excuse us?

8 (Whereupon, the foregoing matter
9 went off the record at 3:10 p.m.
10 and went back on the record at
11 3:31 p.m.)

12 JUDGE SIPPEL: Where do you want
13 to go with this now? I am not going to ask
14 any more questions about the conversations
15 between the witness and Ms. Thomas. Is that
16 -- do I have her name right?

17 MS. WALLMAN: Yes, Your Honor.

18 JUDGE SIPPEL: Ms. Donna Thomas,
19 so -- because she is not going to testify in
20 this case. So where would you like to go?
21 Should we -- we would like to find a reason --
22 I want to get him to state for the record why

1 -- and maybe this is right in his written
2 testimony, we should move on, why there was no
3 -- you know, what happened with Comcast and
4 his agreement?

5 MS. WALLMAN: Well, let me try to
6 do that.

7 JUDGE SIPPEL: Do you want to try
8 to elicit that?

9 MS. WALLMAN: Yes.

10 BY MS. WALLMAN:

11 Q Did an agreement eventuate with
12 Comcast around June of 2004?

13 A No. There is no agreement that
14 concluded.

15 Q Do you have any personal knowledge
16 as to why that didn't occur?

17 A Not firsthand knowledge.

18 Q Did you have any subsequent
19 meetings of consequence that you wish to
20 mention with Comcast?

21 A Two meetings, one in 2005, one in
22 2006.

1 Q Describe the 2005 meeting, please.

2 A I met with Alan Dannenbaum. I was
3 accompanied by another affiliate or affiliate
4 salesperson, a Vice President of Affiliate
5 Sales for WealthTV, John Ghiorzi. When we
6 started out the conversation, Mr. Dannenbaum
7 was inquiring about other cable companies that
8 we received launches on. He asked about
9 Adelphia, which at the time was a cable
10 company. It is not today.

11 I told him that we would be
12 launching shortly on the Adelphia systems,
13 because WealthTV would be replacing a channel
14 called Chronicle. We had worked out an
15 agreement with Chronicle where it would be
16 discontinued and WealthTV would take its
17 place.

18 Mr. Dannenbaum told me that he
19 would contact Adelphia and ensure that that
20 launch did not take place. I was a little
21 surprised, because Comcast did not own
22 Adelphia. I knew that he carried influence.

1 I was concerned that he would make the call
2 that he said he would. I pleaded with him not
3 to.

4 About two weeks later I received a
5 call from a very angry senior programming
6 person at Adelphia. She informed me that
7 WealthTV would not be replacing the Chronicle
8 channel on her system. I told her that I
9 believed it was already approved. She said
10 she didn't care. It was a pretty blunt,
11 direct conversation going back and forth.

12 At the end of the conversation,
13 she made it clear that if WealthTV --

14 MR. SOLOMON: Your Honor, I --

15 JUDGE SIPPEL: Go ahead. Do you
16 have an objection?

17 MR. SOLOMON: Well, I was going to
18 object if he is saying what she made clear.
19 She can say -- he can say what she said,
20 although it is hearsay, but it --

21 JUDGE SIPPEL: Well, it is, but it
22 -- what did he get from -- what did you get

1 from the conversation?

2 THE WITNESS: What I got?

3 JUDGE SIPPEL: Is that all right?

4 Would that be better? Or do you want to go
5 down --

6 MR. SOLOMON: However you would
7 like, Your Honor, is fine.

8 JUDGE SIPPEL: We just want to
9 find out what -- if you can't quote her, tell
10 us what reaction you got to what she said.

11 THE WITNESS: The impression that
12 I was left with, based on her words, is that
13 if WealthTV replaced Chronicle, or tried to,
14 she would shut down the service. She would
15 not let it take place.

16 JUDGE SIPPEL: And she is from
17 Adelphia?

18 THE WITNESS: She is from
19 Adelphia.

20 JUDGE SIPPEL: And wait a minute.
21 Wasn't it -- Adelphia was going to be the one
22 that was going to run it?

1 THE WITNESS: Adelphia was the
2 cable provider.

3 JUDGE SIPPEL: Yes.

4 THE WITNESS: And she made it
5 clear to me that the replacement of this other
6 service channel called Chronicle by WealthTV
7 would not take place. My impression was it
8 was directly due to my meeting with Mr.
9 Dannenbaum and what Mr. Dannenbaum told me and
10 what I pleaded with him not to do. And I
11 believe he did just that.

12 JUDGE SIPPEL: That is what you
13 inferred from all of this.

14 THE WITNESS: Yes, Your Honor.

15 JUDGE SIPPEL: Well, let me see
16 what counsel --

17 MS. WALLMAN: I was going to --

18 JUDGE SIPPEL: Do you want to
19 point him in another direction, or is this --

20 MS. WALLMAN: I was going to move
21 it along.

22 JUDGE SIPPEL: Thank you. Go

1 right ahead.

2 BY MS. WALLMAN:

3 Q Was there any other meeting of
4 consequence with Comcast?

5 A There was one other meeting that I
6 would like to speak about, and that took place
7 I believe it was July of 2006. Again, I was
8 in Philadelphia. I met with Mr. Alan
9 Dannenbaum. The purpose of the meeting was
10 real simple. I wanted to engage in
11 discussions about an agreement. I had some
12 things with me, some updates, some other
13 things that I was pleased to share with him
14 during the discussions.

15 We talked about the services of
16 WealthTV. He indicated to me that he didn't
17 have any room to carry digital, he wasn't
18 going to carry the HD, he didn't want the VOD.
19 It appeared to me the discussions were
20 basically going nowhere.

21 I went back and I asked him, "Can
22 we talk about the HD linear channel of

1 WealthTV?" Mr. Dannenbaum said very bluntly
2 that unless -- the quote as I recall it was,
3 "We are not going to make another MTV on the
4 backs of Comcast without owning it." The
5 statement was really clear. Basically, what
6 he was telling me, "Unless we own the channel"
7 --

8 JUDGE SIPPEL: Well, you don't
9 have to interpret it for us. That is what he
10 said.

11 THE WITNESS: That is what he
12 said. My interpretation of that --

13 JUDGE SIPPEL: I am not asking you
14 for it.

15 THE WITNESS: Okay.

16 JUDGE SIPPEL: Are you asking him
17 to interpret that?

18 MS. WALLMAN: No.

19 JUDGE SIPPEL: I don't think that
20 -- that is as far as it goes. You were asked
21 a question; you answered it. Go ahead.

22 BY MS. WALLMAN:

1 Q Were there any other significant
2 meetings with Comcast before the time when the
3 prefiling notice was issued?

4 A Not that I recall.

5 Q What happened in your attempt to
6 sell WealthTV to Bright House Networks?

7 A I will try to keep it short and to
8 what I directly know. In 2006, I had a phone
9 call -- July of 2006 -- with the Tampa
10 location of Bright House. My understanding of
11 the Tampa location is it is the single largest
12 location of Bright House. I believe it
13 represents more than 50 percent of Bright
14 House. I actually think it is a percentage
15 much higher than that, but on a conservative
16 estimate 50 percent.

17 The phone call was with myself and
18 a marketing person by the name of Ann Stith.
19 And Ann communicated to me that Verizon had
20 launched in her market, which I was very aware
21 of, that she was tracking competitors that she
22 didn't want speaking on behalf of Bright

1 House.

2 It was my impression that she
3 didn't want any differentiators from a
4 programming standpoint in the marketplace, and
5 she was interested in launching our services,
6 our linear digital and HD channel.

7 She asked if we had an agreement
8 with Time Warner. I told her, no, that we
9 were working with Time Warner, but no
10 agreement was in place. She said she couldn't
11 do anything at that point. We needed to have
12 an agreement with Time Warner, because Bright
13 House rides the Time Warner agreements and
14 utilizes the Time Warner agreements.

15 Coming out of that meeting, I
16 wanted to understand if there was any
17 opportunity to engage directly with Bright
18 House regarding an agreement. So I had my
19 assistant send out an e-mail that I wrote the
20 entire body of, copied it, paste it, or sent
21 it to her with instructions to copy and paste
22 my verbiage exactly and send it over to the

1 assistant senior management, Mr. Miron, at
2 Bright House, so we could determine if there
3 is any opportunity to have a direct agreement
4 with Bright House.

5 I received a response -- or my
6 assistant received a response that I believe
7 I was copied on, and it said basically, "Have
8 Charles or one of our sales people contact
9 him." I directed that salesperson who had
10 more firsthand knowledge than me with all of
11 the Bright House locations to make the call.

12 He reported back to me, and when
13 he did it was clear to me that there was no
14 opportunity to engage Bright House directly
15 with an agreement. It could only be done
16 through the Time Warner entity, and getting an
17 agreement with Time Warner before we could
18 launch on any Bright House systems.

19 Q With respect to your --
20 WealthTV's, your efforts to sell WealthTV to
21 Time Warner Cable, what salient meetings can
22 you recount from firsthand knowledge?

1 A I gave presentations with our
2 staff in 2004 to the corporate group.

3 JUDGE SIPPEL: You know, you are
4 pointing to Exhibit 2, so that was --

5 MR. COHEN: Objection, Your Honor.
6 I have a best evidence objection. Exhibit 2
7 is not a Time Warner document. The witness
8 has not produced a deck provided to Time
9 Warner that had the slide that is up as
10 Exhibit 2. It is inappropriate testimony.
11 And the witness is purposely pointing to a
12 document that has not been provided in a Time
13 Warner deck.

14 MR. MILLS: And to the extent that
15 he was testifying with that exhibit there for
16 Cox, he hasn't produced a document that shows
17 --

18 MR. COHEN: Since we are done with
19 Comcast, Your Honor --

20 JUDGE SIPPEL: Wait, wait, just a
21 second. In other words, same objection.

22 MR. MILLS: Same objection.

1 MR. COHEN: So I have a best
2 evidence objection. Frankly, at this point,
3 Your Honor, Exhibit 2 should come down. We
4 are long past it. That is a piece of paper
5 that was presented to Comcast. They have
6 produced and you have admitted into evidence
7 a deck -- as we can remember calling these
8 decks.

9 JUDGE SIPPEL: Yes, I do.

10 MR. COHEN: That was presented as
11 something called Orion Cable. There is no
12 evidence in this case submitted by WealthTV
13 that this deck -- there is no deck that has
14 been provided that was submitted to Time
15 Warner, that was submitted to Bright House,
16 that was submitted to Cox.

17 JUDGE SIPPEL: Take it down.

18 Ms. Wallman, what -- we have got a
19 question and an answer. I am not -- I am
20 sorry, not a question, but we have an answer
21 from the witness that obviously is -- doesn't
22 comport with the proffer of the record that

1 Mr. Cohen has made, and also supported by Mr.
2 Mills.

3 What -- do you have anything to
4 add to this? Do you have anything to -- light
5 to shed on it other than this? I have got to
6 strike his testimony otherwise.

7 MS. WALLMAN: The witness I think
8 has testified that he had a slide that was
9 included in each of these decks. I understand
10 the objection. He may testify as to his
11 recollection of the content of the
12 presentation, and whether he presented
13 information about WealthTV, including the
14 demographic, if he recalls.

15 JUDGE SIPPEL: Again, as I
16 understand, though, this deck was never
17 presented to Comcast, at least Mr. Cohen is
18 saying without any hesitation that the deck
19 was never presented to his client.

20 MR. COHEN: Let me --

21 JUDGE SIPPEL: Or Cox and --

22 MR. COHEN: We do not have -- I

1 want to be very clear in my representation to
2 the Court, Your Honor. We do not have a copy
3 of a deck from WealthTV with that slide.
4 WealthTV has not produced a deck that was
5 presented to Time Warner with that slide. So
6 Ms. Wallman's response would not alleviate my
7 best evidence objection.

8 MS. WALLMAN: I acknowledge that
9 it does not alleviate that objection. I think
10 the best that I can do is to ask the witness
11 if he recalls presenting -- making a
12 presentation with a slide that has that
13 content.

14 JUDGE SIPPEL: Well, I wouldn't
15 use the word "slide." You have to ask the
16 witness, how did he make his -- did he make a
17 pitch, and how did he make it?

18 MS. WALLMAN: Yes, Your Honor.

19 JUDGE SIPPEL: Well, I am going to
20 have -- but I am striking his testimony, his
21 last answer I am striking, because it
22 obviously cannot be supported by the record.

1 MS. WALLMAN: Yes, Your Honor.

2 JUDGE SIPPEL: All right. Do you
3 understand where we are now?

4 THE WITNESS: Yes, I do.

5 JUDGE SIPPEL: Okay.

6 BY MS. WALLMAN:

7 Q Mr. Herring, do you recall meeting
8 with Time Warner Cable in order to present the
9 prospect of selling WealthTV to Time Warner
10 Cable?

11 A I do recall meeting with them, and
12 my role in that meeting -- there were other
13 WealthTV employees -- was to do three things,
14 and I did those three things. One was to talk
15 about the infrastructure and the ownership.
16 The second one was to talk specifically about
17 the target demographic. And the third one was
18 to talk about examples of programming aimed at
19 that target demographic.

20 Q Is there anything else you
21 remember about that meeting?

22 A I did those three things. I did

1 it consistent with slides that I created and
2 memorialized my thoughts, so I knew how to
3 pitch it in a very direct, easy-to-understand,
4 concise manner.

5 Q What happened after that meeting?

6 A In 2004, the next point I would
7 like to bring to the attention of the Court,
8 I met for the first time Mickey Carter, who is
9 a -- I believe his title was Director of
10 Programming. I met him in April of 2005, and
11 from 2005 to 2006 I communicated with Mickey
12 via phone, via e-mail, and occasionally in
13 person with meetings, including a meeting that
14 I gave to him and his boss in Stanford,
15 Connecticut.

16 In 2006, in April of 2006, I met
17 with Mickey at a trade show, Mr. Carter at a
18 trade show, in Atlanta. And at the close of
19 the day, he came by. We went, we sat down,
20 and we talked, and he informed me that Time
21 Warner would engage and would conclude an
22 agreement by the end of summer.

1 I remember the term "end of
2 summer," because I was trying to figure out
3 for several months when the end of summer was,
4 and I am still not sure today, because it set
5 the deadline. The summer came and went, and
6 we didn't have an agreement.

7 I kept trying to figure out why
8 and how we can engage in discussions, but they
9 never took place. By the end of 2006,
10 December 28th I think to be precise, we were
11 contacted -- WealthTV was contacted by Time
12 Warner San Antonio.

13 Based on an e-mail, I made a phone
14 call and arranged a visit. I went down on the
15 initial visit during this timeframe. I met
16 with Scott Pleyte, and I recall his title
17 being a Programming Marketing Manager. And I
18 met with Scott's boss. He communicated to me
19 that his colleagues had watched WealthTV, and
20 I believe he stated on Verizon FiOS in the
21 Dallas area, even though he was in San
22 Antonio, and that they liked what they saw.

1 I was trying to give him an
2 overview on WealthTV. He didn't need it, he
3 didn't really want it. He said that they are
4 ready to launch, that AT&T was launching in
5 San Antonio and they wanted to make a
6 preemptive move and provide as much HD
7 programming as possible.

8 I was pleased. I wanted to do
9 this. I told them we didn't have a corporate
10 agreement. He said he would help out, put a
11 call into corporate, express his level of
12 interest. He told me he had his boss'
13 support. His boss was there. He said they
14 had the support of the GM, that there was a
15 bigger game plan in place, and we were to move
16 forward.

17 Shortly thereafter he told me --
18 and I heard from two sources -- I heard from
19 Scott Pleyte that he communicated with
20 corporate, and he told me that they were
21 willing to conclude an agreement, so we could
22 launch in the near future. I also heard this

1 from Mickey Carter.

2 I asked, what could we do in the
3 meantime? Is there anything we could do?
4 Could we do a side agreement? Could we do
5 just an agreement with San Antonio to launch
6 the linear channel? He said no, we had to
7 work through the corporate group, but they
8 would expedite this for him.

9 He did say that they could launch
10 a service called Video on Demand, or VOD.
11 There is a lot of acronyms with VOD. We were
12 launching -- I told him we could launch HD
13 VOD, which was seen as being better, high
14 definition VOD.

15 There was some lengthy discussions
16 about problems they had, and they were
17 unsuccessful launching the service. We had
18 some experience with it. I told them we would
19 ensure it was successful. We generally don't
20 make our VOD available to cable operators
21 unless they carry our normal fees. It is seen
22 as a value added proposition. We offer it for

1 free. We generally offer it for free for the
2 entire term. There is never a rate associated
3 with it.

4 He had -- he said he had paperwork
5 that he had been given by corporate to execute
6 these types of agreements. We went ahead and
7 we executed an agreement. I asked him, how
8 long should it be? We both felt somewhere
9 around 30 to 60 days we would have a corporate
10 agreement. So we made it six months, more
11 than long enough for a corporate agreement to
12 be addressed.

13 We then started contacting other
14 locations that could carry our VOD. And there
15 was expressions of interest across the nation.

16 I then received a call from Eric
17 Goldberg. I believe his title was Director of
18 Programming for Time Warner corporate. He was
19 located in Stamford, Connecticut. He informed
20 me that we couldn't launch in other areas as
21 we were doing in San Antonio, and that he was
22 going to limit it to only the State of Texas.

1 He said that he would inform me,
2 or have one of his associates inform me, of
3 all of the Time Warner locations in Texas.
4 There are about five or six of them that they
5 sent to me. He told me to go ahead and modify
6 the San Antonio agreement, and he wanted me to
7 do it, to indicate these other systems.

8 I went ahead and followed his
9 orders as well as I could and did exactly as
10 he said an directed a couple of our sales
11 people to contact these other locations.

12 I know that Scott Pleyte out of
13 San Antonio also sent out an e-mail to the
14 other locations. I viewed the e-mail myself.
15 I have read it, and I talked to him about it.

16 I then received a phone call from
17 Eric that he didn't want the other locations
18 in Texas to receive VOD. I didn't understand
19 why. He didn't give me an explanation. I
20 pushed for it. I never heard a decent
21 explanation.

22 MR. COHEN: Objection, Your Honor.

1 JUDGE SIPPET: Well, let's strike
2 the word "decent."

3 THE WITNESS: I never heard an
4 explanation, if I may.

5 We worked with a Time Warner
6 facility, or as I understand it to be a Time
7 Warner facility in California, to prepare our
8 content so it could be sent over to San
9 Antonio, and it can be viewed on their systems
10 as HD VOD.

11 There was over \$100,000, as I
12 recall, being spent on this effort by
13 WealthTV. On March 1st of 2007, the VOD --
14 our HD VOD launched on Time Warner's systems,
15 or a system in San Antonio. It was exhibited
16 on there I believe through the end of August.

17 We still didn't have any
18 communications going back and forth with
19 corporate when it launched -- no terms sheets,
20 nothing. I reached out for Mickey Carter and
21 found out that he was no longer an employee.
22 He left the company.

1 I actually found that out not
2 through Time Warner. I don't recall, as I sit
3 here right now, how I knew that information.
4 I contacted Mr. Pleyte, asked him if he knew.
5 He wasn't even aware of the fact that Mickey
6 Carter left.

7 My only other contact at the time,
8 because another gentleman had moved on that I
9 was aware of and had communications with, was
10 Eric Goldberg. So I asked Mr. Goldberg if he
11 could introduce me to the proper people. He
12 told me no, but if I sent an e-mail requesting
13 it that he would pass it along. I did that,
14 realizing what he was going to do.

15 I then reached out for Mr.
16 Carter's boss, even though he had left the
17 company. My understanding was her name is
18 Melinda Witmer. I placed numerous phone
19 calls, e-mails, never got a response. I
20 reached out for her boss, never got a
21 response. To this day, I don't have a
22 response from either of them. I am pretty

1 effective about getting a response when I want
2 to get a response, being in sales for as long
3 as I have been.

4 No agreement was ever reached. At
5 that point, you know, things basically were
6 going nowhere. By June -- there is a few
7 other points that I think are key, but just to
8 finish this off, by June we -- I sent a notice
9 out to Scott, and I believe I copied his boss
10 --

11 JUDGE SIPPET: Who is Scott?

12 THE WITNESS: Scott Pleyte with
13 Time Warner, his boss, Dean Aitken, and I
14 believe Eric Goldberg, and there might have
15 been others, saying I understand that the VOD
16 agreement was a six-month agreement. I
17 believe it had an auto renew clause in it.

18 But, regardless, I was notifying
19 them that after we sent the data out for July,
20 which they were welcome to keep on their
21 system through the end of August, we would not
22 be sending out any more HD VOD data.

1 And there is more, but I think
2 that summarizes, as concisely as I can, the
3 written testimony.

4 JUDGE SIPPEL: Okay. Is that --
5 have you got more?

6 MS. WALLMAN: Yes, there is more,
7 with the Court's permission.

8 JUDGE SIPPEL: We are way past 30
9 minutes.

10 MS. WALLMAN: Yes, Your Honor.

11 JUDGE SIPPEL: I might be
12 responsible for some of that, but can we --
13 can we do something to cut it short? Because
14 he has got written testimony that is pretty
15 voluminous.

16 MS. WALLMAN: Okay. I will try to
17 be very brief, if I may.

18 JUDGE SIPPEL: Thank you.

19 BY MS. WALLMAN:

20 Q You are familiar with a
21 programming service that was called Mojo?

22 A I am.

1 Q How did you first learn of the
2 Mojo channel?

3 A On March 19, 2007, I believe I
4 read a press release the day it came out, and
5 --

6 MS. WALLMAN: I would like to show
7 the witness Exhibit 94.

8 JUDGE SIPPEL: Exhibit 94. Thank
9 you. Do you have more copies? Go ahead.
10 Thank you.

11 BY MS. WALLMAN:

12 Q Is this the press release that you
13 recall seeing?

14 A Yes.

15 JUDGE SIPPEL: This is in
16 evidence?

17 MS. WALLMAN: Yes, Your Honor.
18 This has been --

19 JUDGE SIPPEL: It looks familiar.
20 Go ahead.

21 MS. WALLMAN: -- received into
22 evidence.

1 BY MS. WALLMAN:

2 Q Please describe what happened when
3 you read the press release.

4 A Well, I read through it, and went
5 through it quickly, and I noticed that it is,
6 you know, targeting affluent primarily men
7 with Series of Adventure Travel, comedy,
8 finance, music, cuisine, spirits, and high-
9 tech toys. And this was a great description
10 of WealthTV. I was floored.

11 You know, we were looking for, and
12 had been for some time, any other services
13 that might be competitors to WealthTV, afraid
14 that, you know, our uniqueness wouldn't exist.
15 This was the first time I found one being
16 launched by iN DEMAND. I was familiar with iN
17 DEMAND. I did some research on the other HD
18 channels going back to 2003/2004, just trying
19 to understand the marketplace.

20 I was familiar with iNHD. By no
21 means did I ever consider it a competitor to
22 WealthTV. It was an HD service, but my

1 understanding when I went out and looked and
2 tried to understand iNHD is that they were
3 different than WealthTV. It was more of a
4 generic entertainment channel that focused on
5 being in high definition. It didn't have a
6 theme.

7 JUDGE SIPPEL: Nobody has asked
8 you a question on this at all. You know, this
9 is really going --

10 THE WITNESS: Sorry.

11 JUDGE SIPPEL: He was the press
12 release, and what -- so what did the press
13 release mean to you, in bottom line terms?

14 THE WITNESS: The bottom line was
15 iN DEMAND, owned by the four defendants, had
16 just launched -- or preparing to launch a
17 service that was basically competing directly
18 with WealthTV, my search on the internet --

19 JUDGE SIPPEL: That is all. That
20 answers the question.

21 MS. WALLMAN: Your Honor, there
22 were a couple of exhibits where you reserved

1 your evidentiary ruling. I don't know what
2 process exactly to follow to --

3 JUDGE SIPPEL: Do you want to
4 bring them in through this witness?

5 MS. WALLMAN: I would like to,
6 yes.

7 JUDGE SIPPEL: Well, let me ask
8 you if you can do this. Because of the hour,
9 if you are prepared to -- maybe we could have
10 the written testimony voir dire. We could get
11 that started, see if we can bring that in, at
12 least I can make a ruling on it, and start
13 some cross examination before -- and we can
14 take that up at a later time. I mean, the
15 reserved exhibits.

16 MS. WALLMAN: I am amenable to
17 that. It would seem to me natural to do it on
18 direct.

19 JUDGE SIPPEL: I agree. No, I
20 agree with you. But it is 4:00 now, and, you
21 know, we haven't gotten too far. I will
22 assume responsibility for a lot of that, but

1 we still haven't gotten too far.

2 MS. WALLMAN: Well, if we can come
3 back to those exhibits, just for purposes of
4 identification, we -- there had been rulings
5 reserved on 19, 25, and 30. And those would
6 be the three that I would --

7 MR. COHEN: Your Honor, the
8 written testimony is in evidence. I would
9 just as soon we have the argument now about
10 these exhibits, but it is ultimately up to
11 Your Honor.

12 JUDGE SIPPEL: That is good. All
13 right. Let's do it.

14 This testimony is marked. Can we
15 --

16 MR. COHEN: I think it has been
17 admitted, Your Honor.

18 JUDGE SIPPEL: No, I marked it.
19 You said you wanted to voir dire on it or
20 something. I was reserving on --

21 MR. COHEN: I think my
22 recollection is on the declaration with

1 respect to lost e-mails. I think --

2 JUDGE SIPPEL: All right. Hold
3 on.

4 MR. COHEN: -- was admitted, the
5 written direct testimony, as Exhibit 144.

6 JUDGE SIPPEL: 144.

7 MR. COHEN: And, Your Honor, in
8 any event, we have no objection, so --

9 JUDGE SIPPEL: Okay. Let's --

10 MR. COHEN: -- to admit it a
11 second time.

12 JUDGE SIPPEL: Thank you.

13 (Laughter.)

14 We will -- well, anyway, if it is
15 not in, 144, as identified, is now in
16 evidence.

17 Thank you, Mr. Herring. So your
18 testimony is in. Your direct testimony is
19 enough. Your direct testimony has been
20 concluded.

21 (Laughter.)

22 No, no, no. We just set the tea

1 table. That is --

2 (Laughter.)

3 You have got to sit down now.

4 Now, we have got three exhibits
5 that are on reserve?

6 MS. WALLMAN: There are three that
7 were in reserve, yes.

8 JUDGE SIPPEL: Okay. Let's start
9 with those, then.

10 MS. WALLMAN: Okay. The first of
11 those is Exhibit 25.

12 JUDGE SIPPEL: This is --
13 obviously, it is WealthTV 25.

14 MS. WALLMAN: It is WealthTV 25.
15 Yes, Your Honor.

16 JUDGE SIPPEL: All right. Let's
17 start with that. Can you get a copy before
18 the witness?

19 MS. WALLMAN: Yes, Your Honor.

20 MR. MILLS: We are on what number,
21 19?

22 MR. COHEN: 25.

1 MS. WALLMAN: 25.

2 JUDGE SIPPEL: Now, I take it you
3 are going to ask the witness who prepared this
4 document and for what purpose, something along
5 those lines?

6 MS. WALLMAN: Yes, Your Honor.
7 And with your permission, this is an enlarged
8 version of the same exhibit.

9 JUDGE SIPPEL: Any objection to
10 the blowup?

11 MR. COHEN: I don't think either
12 one is admissible, but we will deal with it.

13 JUDGE SIPPEL: Well, it is being
14 observed. It is not being received.

15 MR. COHEN: Yes. But you have it
16 in front of you anyway.

17 JUDGE SIPPEL: I hear you. You
18 don't like it.

19 (Laughter.)

20 Go ahead.

21 MR. COHEN: It is just a question
22 of rules of evidence, Your Honor, not a

1 personal --

2 JUDGE SIPPEL: Well, we don't have
3 a jury. You can present it as you see fit,
4 Ms. Wallman.

5 BY MS. WALLMAN:

6 Q Mr. Herring, did you prepare this
7 document?

8 A I did.

9 Q And why did you do that?

10 A I was trying to show on paper my
11 thoughts at the time with the different
12 categories that Mojo had, and the categories
13 where we offered programming. I have updated
14 it with other programs that we have, but that
15 is what I was trying to do -- a comparison
16 back and forth on how similar these two
17 networks are.

18 Q What do you mean by "at that
19 time"? When did you prepare this exhibit?

20 A The exhibit was prepared maybe a
21 year ago, and it has been updated.

22 JUDGE SIPPEL: Let's give the year

1 and a month or something like that, as best
2 you can get it.

3 THE WITNESS: I don't recall. I
4 know it has been updated in the last month or
5 so. I don't recall when I actually produced
6 it for the first time.

7 JUDGE SIPPEL: Well, it has got to
8 be 2008.

9 THE WITNESS: Yes, sometime in
10 2008. My best guess is about a year ago.

11 JUDGE SIPPEL: And then, it was
12 updated?

13 THE WITNESS: It was updated about
14 a month or so ago.

15 JUDGE SIPPEL: All right. So a
16 month or so would be March -- February/March?

17 THE WITNESS: Yes, Your honor.

18 BY MS. WALLMAN:

19 Q Did you prepare it in connection
20 with this litigation, or for some other
21 purpose?

22 A I prepared it initially to show

1 the similarities that we had with Mojo as far
2 as the programs that go into these categories
3 that they have identified in their press
4 release. That was the original intent, and
5 then I updated it for this hearing.

6 Q So is this a reasonable summary of
7 your views about similarities between Mojo and
8 WealthTV?

9 A It is.

10 MR. MILLS: Your Honor, I object
11 and move to strike that. There is no
12 foundation for it. There is no -- it is a
13 leading question. It is vague. I don't know
14 that "reasonable" means. He hasn't been
15 proffered as an expert. I object to that.

16 MS. WALLMAN: Your Honor, I am
17 asking about his --

18 JUDGE SIPPEL: I understand what
19 you are doing. I am going to overrule that
20 objection. This is a little different -- the
21 questions need to be just a little --

22 MR. COHEN: Your Honor, can I --

1 JUDGE SIPPET: I am going to get
2 to you, Mr. Cohen.

3 (Laughter.)

4 This is -- it is a different form
5 for -- of handling, even on direct, of a
6 witness with respect to a document as opposed
7 to asking him to relate a situation. So I
8 have to -- I am going to -- you know, I want
9 Ms. Wallman to do it the way she wants to do
10 it, as long as nobody gets prejudiced by it.

11 She has done a very good job of
12 having him identify exactly what this is. I
13 know what it is based on your testimony, at
14 least what you represent it to be. The only
15 thing I don't understand still is your answer
16 with respect to, why was it prepared in the
17 first instance? What did you care about
18 having this kind of a lineup between Mojo and
19 WealthTV back in 2008?

20 THE WITNESS: When I first read
21 the press release and it listed these
22 categories, I was amazed because we were

1 focusing in those --

2 JUDGE SIPPEL: I don't care if you
3 were amazed. Why did you make this document
4 up?

5 THE WITNESS: To show the
6 comparisons initially in my mind --

7 JUDGE SIPPEL: Between who? Who
8 are you going to show it to?

9 THE WITNESS: I did it for myself.

10 JUDGE SIPPEL: Really?

11 THE WITNESS: Yes.

12 JUDGE SIPPEL: Did you do this on
13 company time?

14 THE WITNESS: Absolutely. And
15 then, I updated it.

16 JUDGE SIPPEL: Well, it is your
17 company.

18 (Laughter.)

19 All right. For the life of me, I
20 -- well, no, I can see how some -- you know,
21 I do some unusual things.

22 (Laughter.)

1 But there is no business purpose
2 to this. I am trying -- gee, I am sorry.

3 THE WITNESS: I believe it --

4 JUDGE SIPPEL: There is no
5 business purpose for the document.

6 THE WITNESS: I believe that it is
7 important to understand our competitors. And
8 I thought I knew other HD services, and I came
9 to the conclusion in my own mind that these
10 other HD services were not competitors. This
11 service, Mojo, when I first read about it, I
12 believed was a direct competitor.

13 When I looked at the programming
14 categories and started thinking about, what do
15 we have in those same categories and how did
16 it stack up, I did that comparison first in my
17 head, and then I started looking at our
18 programming. I knew how similar they were.

19 JUDGE SIPPEL: Did you have a
20 lawsuit in mind?

21 THE WITNESS: No, not when I did
22 that. When I did that, I wanted -- I knew

1 most of our programming.

2 JUDGE SIPPEL: That is okay. You
3 answered my question. You said no, you
4 didn't.

5 THE WITNESS: No, I didn't. I was
6 trying to understand --

7 JUDGE SIPPEL: No, you told me
8 why. You told me why.

9 MR. COHEN: Your Honor, whenever
10 you are ready. I am sorry. I didn't mean to
11 interrupt you.

12 JUDGE SIPPEL: Well, that is okay.
13 All right.

14 MS. WALLMAN: Your Honor?

15 JUDGE SIPPEL: That is his -- that
16 is the statement.

17 MS. WALLMAN: Yes.

18 JUDGE SIPPEL: All right.

19 MS. WALLMAN: And, Your Honor --

20 JUDGE SIPPEL: Can we proffer him
21 now for cross examination on this?

22 MS. WALLMAN: Cross examination?

1 JUDGE SIPPEL: Or voir dire?

2 MS. WALLMAN: On whether --

3 JUDGE SIPPEL: Voir dire on the
4 document, can we do that?

5 MS. WALLMAN: Yes.

6 JUDGE SIPPEL: Okay.

7 VOIR DIRE EXAMINATION

8 BY MR. COHEN:

9 Q Mr. Herring, we have met a number
10 of times at various depositions in this case,
11 have we not?

12 A Yes.

13 Q Is it your testimony that you
14 prepared this first version of this Exhibit 25
15 in 2008?

16 A I don't recall exactly when I
17 prepared it. I believe it was about a year
18 ago, but I am not sure.

19 Q You testified in response to Ms.
20 Wallman's questions it was 2008, correct?

21 A I believe it was.

22 Q Okay. And you recall when you

1 brought a carriage complaint against Time
2 Warner Cable?

3 A December 21, 2007.

4 Q All right. And at the time you
5 prepared this document, you had already sued
6 Time Warner, had you not?

7 A By --

8 Q Could you answer that yes or no?

9 A I am not sure. I believe that is
10 correct, if it was a year ago.

11 Q You are sure, aren't you, that
12 2007 is before 2008?

13 A I am pretty --

14 MS. WALLMAN: Your Honor,
15 argumentative.

16 JUDGE SIPPEL: All right. Strike
17 that. Let's go. Rephrase that.

18 BY MR. COHEN:

19 Q Mr. Herring, you prepared this
20 document a year ago when you were in
21 litigation with Time Warner Cable, correct?

22 A I don't believe that to be the

1 case. It may be, but I don't believe it to be
2 the case. This document, when I first
3 prepared it, I prepared it first in my mind,
4 and then on paper, then an Excel spreadsheet,
5 and then I updated it recently. But I don't
6 believe I initially prepared it before
7 December 21st, but I am not sure.

8 Q Mr. Herring, I am not asking you
9 about what you prepared in your mind. Did you
10 testify truthfully under oath -- and the Judge
11 asked you the question as well -- that you
12 prepared this document in 2008?

13 A I believe it was about a year ago,
14 is what I said.

15 Q Right. And wouldn't you agree
16 with me that a year ago was subsequent to the
17 time you were in litigation with Time Warner
18 Cable in this proceeding?

19 A We filed the complaint December
20 21, 2007, which is before 2008.

21 Q Right. And the complaint alleged
22 that Mojo and WealthTV were similar, correct?

1 A Yes.

2 Q And at the time you prepared this
3 document in 2008, had you already sued Comcast
4 in this proceeding?

5 A No.

6 Q Had you already sued Bright House
7 in this proceeding?

8 A I don't know. I am not -- I don't
9 know.

10 Q Had you already -- you don't
11 remember when you sued Bright House?

12 A I don't recall when we filed the
13 complaint.

14 Q Had you already sued Cox?

15 A I believe that it was somewhere
16 around March 2008 when we filed the complaint
17 against Cox.

18 Q Did you produce the earlier
19 version of this document as a business record
20 in the course of discovery in this case?

21 A I produced something like this
22 from the thought process where I did

1 comparisons based on groups where these
2 programs fell into.

3 Q Sir, I am not asking about a
4 declaration or anything you prepared in court.
5 If you had a document that was a predecessor
6 of this document that you are claiming you did
7 not do in connection with this litigation, why
8 didn't you produce it in discovery, if it was
9 a business record relating to the subject
10 matter of this case?

11 A So let me see if I can answer that
12 very clearly and precisely. There are
13 documents that I made, that I produced, that
14 have been supplied in discovery that show
15 comparisons in these categories that are on a
16 PowerPoint presentation that has a similar
17 thought process. They are not on an Excel
18 spreadsheet like this.

19 Q I am asking you a different
20 question, sir. Did you produce to us in
21 discovery any version of Exhibit 25? Could
22 you answer that yes or no?

1 A On an Excel spreadsheet, the
2 answer is no.

3 Q Now, sir, this is your comparison
4 of the programming on the two networks,
5 correct?

6 A It is a comparison in these
7 categories that Mojo has stated are the key
8 categories for it.

9 Q Have you retained an expert in
10 this case to testify about the comparisons
11 between Mojo and Wealth?

12 A We have.

13 Q And that is Ms. McGovern?

14 A Yes.

15 Q Okay. And she is going to testify
16 on your behalf?

17 A I believe so.

18 Q And, in fact, you personally
19 retained her, did you not?

20 A Yes, I was involved in it.

21 MR. COHEN: Your Honor, this is --
22 I object to the admission of the document. It

1 was obviously prepared in the course of this
2 litigation. It was prepared subsequent to the
3 time of the filing of this proceeding. If it
4 were an ordinary business document, it should
5 have been produced in discovery. It was not.
6 It is not a summary of voluminous evidence
7 under the rules of evidence, because you have
8 to only summarize actual voluminous documents,
9 not summarize your thoughts.

10 And, in addition to that, as we
11 said in our in limine motion, it is improper
12 expert testimony. Their expert is going to
13 offer testimony on these various genres, so I
14 have a series of objections. I don't know
15 whether anyone else has anything else.

16 MR. MILLS: Yes. As a matter of
17 judicial notice, we would ask the Court to
18 recognize that there were prefiling notices --
19 there were notices filed about a year in
20 advance of the actual filing of the
21 litigation, so it was not -- just to remove
22 any doubt that this was not somewhere around

1 a year ago. It might have been before the
2 filing of the Time Warner complaint.

3 This was well after the prefiling
4 notices were made in this case for all four
5 defendants. So litigation was clearly in
6 mind. We, on behalf of Cox, also did not
7 receive any version of this document in
8 discovery. And we had an agreement in this
9 case that if there were privileged documents
10 that were prepared for litigation, as opposed
11 to business records, they were not even
12 listed. We didn't even have to produce them.
13 That was just a matter for counsel to decide
14 amongst themselves.

15 And we assume that this could only
16 -- if this document existed, it must have been
17 withheld as a matter of privilege or work
18 product. This is -- if this is a business
19 record, it should have been produced, and it
20 is prejudicial to do it now.

21 JUDGE SIPPEL: It hasn't been seen
22 in discovery, but now it is coming in as an

1 affirmative piece of evidence.

2 MR. MILLS: I think it is
3 argumentative expert rebuttal testimony, Your
4 Honor.

5 MR. COHEN: Your Honor, my point
6 is that an effort was made -- and I don't
7 think it succeeds -- to demonstrate that this
8 wasn't done -- there is no doubt that this was
9 prepared a year ago. It was after this
10 litigation began.

11 JUDGE SIPPEL: I know, but --

12 MR. COHEN: But if this were
13 actually a business record, which is the
14 proffer, it needed to be produced in
15 discovery.

16 JUDGE SIPPEL: All right. I have
17 heard it two or three different ways. Do you
18 want to reply to that, Ms. Wallman?

19 MS. WALLMAN: Your Honor, I think
20 the witness was trying to testify that there
21 were other formats, other file format, such as
22 PowerPoint in which information similar to

1 this was contained. So I -- and I think it
2 goes too far to suggest that it was a document
3 that was withheld.

4 The effort here was to summarize
5 live testimony. There was a lot cut out of
6 his testimony in the negotiation process, the
7 discussion process with defendants. Your
8 Honor indicated that summary documents
9 sometimes were useful as a way of compressing
10 a lot of evidence it would take a lot of time
11 to recite.

12 This is a document that the
13 witness has testified as to what he did with
14 it and how it came from his thought process.

15 JUDGE SIPPEL: Mr. Schonman?

16 MR. SCHONMAN: Your Honor, it was
17 my understanding if this chart reflects the
18 witness' current thinking, it is essentially
19 a supplement to his direct testimony. It is
20 something that summarizes his current
21 thinking. He can be cross examined about it,
22 to the extent that it assists the Court in

1 understanding what the witness' beliefs and
2 understandings are. To that extent, it would
3 help Your Honor.

4 I don't think it is prejudicial,
5 because counsel for the defendants will have
6 ample opportunity to cross examine the
7 witness' understanding about his beliefs
8 regarding the differences or similarities
9 between the two channels.

10 MR. COHEN: Your Honor, that is --

11 JUDGE SIPPEL: I am prepared to
12 rule on this. I am not going to let it in.
13 It seems to me that it is going -- if we have
14 got an expert that is going to testify in this
15 area, it is just going to cause -- it is going
16 to cause more confusion than it is going to
17 cause clarity.

18 And it is true, this is the type
19 of testimony it would -- that should come
20 through an expert, not somebody who has an
21 interest in the case to the extent that this
22 witness does. But I do want it in the record,

1 because I have got some -- I have got some
2 serious questions about -- I have got some
3 serious potential credibility questions based
4 on what I have heard.

5 So I am going to leave it marked
6 as an exhibit, and it will stay in the record
7 that way. But it is being -- it is not being
8 received in evidence to be used in -- you
9 know, in findings or in a substantive way.

10 So what is the next exhibit?

11 MS. WALLMAN: Your Honor, one more
12 point. If there is a credibility issue, I
13 think we can clarify it.

14 JUDGE SIPPEL: The record is made.
15 The record is made. I didn't say I am going
16 anywhere with it. I just said that I have got
17 a question. That is all. So I want this in
18 the record, because I have got to look at it
19 in light of the testimony. But I can't do
20 that today.

21 MS. WALLMAN: Yes, Your Honor.

22 JUDGE SIPPEL: And I don't intend

1 to do it tomorrow.

2 MR. FELD: Your Honor, may I make
3 a proffer --

4 JUDGE SIPPEL: Yes, sir.

5 MR. FELD: -- as to how we would
6 attempt to address this in this instance?

7 JUDGE SIPPEL: In this instance.

8 MR. FELD: That is to say, with
9 regard to this credibility question and the
10 apparently contradictory answer in which he
11 says --

12 JUDGE SIPPEL: No, no, no, no, no.
13 Now you are going where you don't belong.

14 MR. FELD: I am --

15 JUDGE SIPPEL: We have got a
16 transcript, we have an exhibit. Now, what is
17 the next exhibit? I am doing you a favor,
18 okay? I am putting you on notice. That is
19 all.

20 Next exhibit, please?

21 MS. WALLMAN: Yes, Your Honor.

22 DIRECT EXAMINATION (cont'd)

1 BY MS. WALLMAN:

2 Q Earlier in your testimony you
3 mentioned a target audience of WealthTV. Did
4 you ever do anything to check to see whether
5 your programming was reaching the target
6 audience?

7 A Yes.

8 Q What did you do?

9 A When we launched the channel, we
10 launched it with a website. We encouraged
11 viewers to go to the website. I think there
12 is 64 addresses that lead you to the same
13 site. Bottom line is there is a feedback form
14 on the website, and there always has been a
15 feedback form. There is also a form called
16 the comments form.

17 And we solicit positive/negative
18 comments, and we solicit viewers to fill out
19 information on themselves, which they do. And
20 occasionally I see these comments, especially
21 when it is something that has to do with the
22 network that we think we need to address or

1 fix, and occasionally I see summaries of the
2 forms showing demographic information.

3 MS. WALLMAN: Your Honor, I would
4 like to show the witness an exhibit that has
5 been marked by WealthTV as Exhibit 30. Your
6 Honor reserved an evidentiary ruling --

7 JUDGE SIPPEL: Thank you.

8 MS. WALLMAN: -- on this.

9 JUDGE SIPPEL: Let's show the
10 witness the copies, and all the rest of us,
11 please. Thank you.

12 BY MS. WALLMAN:

13 Q Mr. Herring, have you seen this
14 before?

15 A I have.

16 JUDGE SIPPEL: Can we identify it
17 for the -- I mean, it is -- it is self-
18 evident, right? December 19, 2007, e-mail
19 from John Nickels to Messrs. Herring. There
20 must be two Herrings, then. Is this you and
21 your Dad?

22 THE WITNESS: I believe my father

1 is copied on it.

2 JUDGE SIPPEL: Okay.

3 THE WITNESS: So is my brother.

4 JUDGE SIPPEL: Okay. Well, we
5 will just -- let me see. Robert Herring, that
6 is your father, is that correct?

7 THE WITNESS: Yes, Your Honor.

8 JUDGE SIPPEL: And we know who
9 Charles Herring is. And where is your brother
10 on this?

11 THE WITNESS: The second page that
12 is shown as page 1 shows bobby.herring, which
13 would be my brother.

14 MR. MILLS: I think he is counting
15 the cover page as page 1. I think he means
16 the e-mail.

17 THE WITNESS: Yes.

18 JUDGE SIPPEL: I am back on the
19 e-mail, but I don't see it. That is -- I just
20 -- I see John Nickels. I am with you. Got
21 it. Thank you.

22 BY MS. WALLMAN:

1 Q Mr. Herring, how, if at all, does
2 this exhibit relate to your prior testimony
3 about what you did to check to see whether
4 your programming was reaching the target
5 audience?

6 A Mr. Nickels was summing up -- I
7 believe it is about 550 feedback forms for a
8 specific purpose at the time, and he reported
9 all the information that was on the forms to
10 us, on the feedback forms.

11 Q And for what purpose did you use
12 this document?

13 A At the time, we wanted to solicit
14 advertisement for adult beverage, specifically
15 Grey Goose, which is a high end vodka
16 manufacturer. In order to solicit the alcohol
17 industry, they self-monitor where they place
18 ads, is my understanding.

19 And they need assurance --
20 reasonable assurance -- that 70 percent of the
21 audience, the primary audience, is of drinking
22 age or greater. And we were trying to fill

1 that requirement, we were monitoring some
2 internal data, and we had a third party do the
3 same.

4 Q And what, if anything, did this
5 tell you about whether you were or were not
6 reaching your target audience?

7 MR. COHEN: Objection, Your Honor.
8 I don't know how that goes to the admission of
9 the testimony, what it told him.

10 MS. WALLMAN: Withdrawn. I offer
11 this document for consideration to be received
12 into evidence.

13 MR. COHEN: I object, Your Honor.
14 I would like to voir dire the witness.

15 JUDGE SIPPEL: Please do.

16 VOIR DIRE EXAMINATION

17 BY MR. COHEN:

18 Q Mr. Herring, the third party that
19 you refer to that was monitoring this same
20 data, that is Mr. Kersey?

21 A Mr. Kersey was monitoring data.
22 It wasn't the same data.

1 Q He was monitoring data at the same
2 time, correct?

3 A I don't believe that to be
4 correct.

5 Q Okay, sir. Why don't you look at
6 page 2. First of all, it says "data derived
7 from 10/23/06 to 12/19/07." That is not
8 correct, is it?

9 A I don't believe that to be
10 correct.

11 Q Right. It is from 10/23/07 to
12 12/19/07, correct?

13 A I believe that to be correct.

14 Q Okay. Is Mr. Nickels going to
15 join us today, any time during this hearing,
16 so we can ask him about how he compiled this
17 data?

18 A No.

19 Q And this data is compiled when
20 somebody flicks on a comment form on your
21 website, right?

22 A No.

1 Q They make a submission to your
2 website?

3 A It is not compiled at that time.
4 It was not tabulated automatically. It is
5 manually done.

6 Q Right. So the way that this
7 information is collected is if somebody clicks
8 on a website, you have a long form and a short
9 form on which you solicit comments from your
10 viewers, right?

11 A That is correct.

12 Q Okay. And the long form asks for
13 some information, including sex, correct?

14 A Yes.

15 Q And in 2006, at least at the
16 beginning of -- or 2007, at the beginning of
17 this period, when this data was collected, the
18 short form did not ask whether the person
19 submitting it was male or female, correct?

20 A I am not positive. I believe that
21 to be correct.

22 Q You believe it to be correct,

1 correct?

2 A I think it is.

3 Q And the way this data was

4 tabulated by Mr. Nickels is that each one of

5 these submissions on the website generates

6 essentially an e-mail to WealthTV, correct?

7 A Yes.

8 Q And at one point in time there was

9 an e-mail from a WealthTV respondent that

10 would have supported each of these entries,

11 correct?

12 A Yes.

13 Q Okay. Do you have those any more?

14 A I don't believe so.

15 Q Are there any of -- do you have

16 any of these 500 e-mails that we can check to

17 see if Mr. Nickels did this tabulation

18 correctly?

19 A I know there are some of them, but

20 not the entire group that Mr. Nickels did.

21 Q The ones that Mr. Kersey produced,

22 correct?

1 A That's correct.

2 Q Your expert. Does WealthTV, in
3 its own files, have any of the responses that
4 underlie this table, so that we can verify
5 whether Mr. Nickels' tabulation is done
6 correctly?

7 A I don't believe we have a complete
8 set.

9 Q You don't have any. Mr. Kersey
10 gave them to you, correct?

11 A I am not even confident of the
12 time period. I know he has collected 550. I
13 know it was simultaneously, but I don't even
14 -- I am not even confident of the time period.
15 I believe you have it accurate.

16 Q Okay. And you have had this
17 comment form on your website since 2004,
18 correct?

19 A Yes, we have.

20 Q Okay. Where are the rest of the
21 tabulations for 2004 and 2005 and 2006 and
22 2008 and 2009, do you have those?

1 A I don't have them.

2 MR. COHEN: Your Honor, we object.

3 First of all, it is a hearsay document. It
4 was compiled by Mr. Nickels. The witness has
5 correctly stated that Mr. Nickels is not going
6 to testify. The witness has not seen --
7 cannot vouch for the underlying data. We
8 don't have the underlying data. We can't
9 verify whether this was done accurately. We
10 can't ask Mr. Nickels any questions about the
11 process in which he did it.

12 BY MR. COHEN:

13 Q Let me ask you this question, sir,
14 if I may.

15 May I ask one more question?

16 JUDGE SIPPEL: Yes, you may.

17 BY MR. COHEN:

18 Q Did you personally tabulate this
19 data?

20 A I did not.

21 Q Did you personally review all of
22 the e-mails that Mr. Nickels reviewed to

1 tabulate this data?

2 A I did not.

3 MR. COHEN: My objection stands,
4 Your Honor.

5 JUDGE SIPPEL: Are there any other
6 objections? Mr. Mills or --

7 MR. MILLS: No. I would just note
8 that there are reliability issues with regard
9 to this data, because that was certainly the
10 case with regard to Mr. Kersey's data. And
11 that has been established in deposition.

12 JUDGE SIPPEL: Mr. Beckner? Mr.
13 Solomon?

14 MR. SOLOMON: We join in the
15 objection.

16 MR. BECKNER: I join the
17 objection. I have nothing to add
18 substantively to what has been said.

19 JUDGE SIPPEL: Mr. Schonman?

20 MR. SCHONMAN: No, sir.

21 JUDGE SIPPEL: Anybody have
22 anything to ask?

1 MS. WALLMAN: Your Honor, may I?

2 JUDGE SIPPEL: Of course. I am --
3 yes, yes, of course. You are going to reply.

4 MS. WALLMAN: If I may.

5 JUDGE SIPPEL: Yes, please do.

6 MS. WALLMAN: Mr. Herring has
7 employees whose job it is to perform the
8 function that is represented in this e-mail,
9 and the chart attached to it. He has
10 explained what the process was.

11 And I note that in connection with
12 Bright House an exhibit was offered yesterday
13 and accepted into evidence. It was a survey,
14 a report on a survey. The author of the
15 survey is not available. But I am invited to
16 test its credibility by examining a supervisor
17 of that person. That document is coming into
18 evidence.

19 MR. COHEN: Your Honor, you ruled
20 yesterday.

21 MR. BECKNER: Can I respond to
22 that, Your Honor?

1 JUDGE SIPPEL: Go ahead, Mr.
2 Beckner. I am sorry.

3 MR. BECKNER: First off, I think
4 counsel is mistaken. The ALJ's ruling was
5 that admissibility of that document was
6 reserved. It was not accepted into evidence.

7 Secondly, as I explained
8 yesterday, and unlike this document here -- I
9 assume this document here is being offered for
10 the truth of what it says, namely that the
11 demographics of the WealthTV audience are
12 70.39 percent male, etcetera.

13 The survey, as I explained
14 yesterday, I am not offering for the truth of
15 what it says, namely that WealthTV ranks 35
16 out of 36 in a viewer preference poll as to
17 what people want to watch, but simply that the
18 survey was one factor that my client used in
19 making its decision whether or not to carry
20 WealthTV. And, you know, there is a big
21 difference.

22 I am not offering the survey for

1 the truth of what it says, but I believe
2 WealthTV is offering the Exhibit 30 for the
3 truth of what it says. And, you know, and if
4 it is not offered for the truth of what it
5 says, I can't see how it is relevant at all.

6 MS. WALLMAN: Your Honor, I am
7 offering it because Mr. Herring has testified
8 about his belief that WealthTV competes with
9 Mojo. This informs his impression that the
10 two compete.

11 MR. COHEN: Your Honor, that would
12 not address my reliability concern.

13 JUDGE SIPPEL: No, I am just going
14 to keep hearing -- it is starting to get
15 echoes in here. Back in my earlier times, you
16 know, the days of yellow pads and dial
17 telephones, we tried a case one time for
18 another agency, and it was called a churning
19 case.

20 And the way that evidence is put
21 in is somebody who is an investigator --
22 somebody who knows about numbers lines all of

1 these numbers up, based upon stock
2 confirmations, that may run into the
3 thousands. And it is a nice, neat compilation
4 of all of the transactions and the dates, and
5 you figure out, you know, they are bought
6 three months before they are sold, and there
7 is X number of commissions generated,
8 something along those lines.

9 The point is that you have to
10 truck in not just that -- not just the
11 compilation, but you had to bring a box of
12 confirmations in, too, so that the other side
13 could sit down and do the same thing that you
14 did. Otherwise, you don't know what is
15 reliable and what is not reliable. You can't
16 just rely on a chart, no matter how careful it
17 is prepared, unless you have the underlying
18 data.

19 So just on basis of reliability, I
20 wouldn't receive that into evidence,
21 particularly since it is being offered for the
22 truth of what it purports to represent. And

1 there is other reasons perhaps, but -- that
2 have already been cited, but, anyway, that is
3 my ruling. It is rejected for reliability
4 purposes, or reasons of reliability rather.

5 Okay. Next document?

6 MS. WALLMAN: That is all I have,
7 Your Honor. The witness is tended for cross
8 examination.

9 JUDGE SIPPEL: Don't we another --
10 a third? I thought we had a third document.

11 MS. WALLMAN: I am going to
12 withdraw the line --

13 JUDGE SIPPEL: Withdraw that?

14 MS. WALLMAN: Yes.

15 JUDGE SIPPEL: Well, what is the
16 number, so that I can rule on it?

17 MS. WALLMAN: It is 19.

18 JUDGE SIPPEL: 19?

19 MS. WALLMAN: Yes, Your Honor.

20 JUDGE SIPPEL: All right. Does
21 anybody -- Mr. Cohen, Mr. Mills, Mr. Beckner,
22 anybody want to make a final objection to

1 that, but explain to me what it is and why?

2 I can rule on this.

3 MR. COHEN: I think she is

4 withdrawing it, Your Honor.

5 JUDGE SIPPEL: Oh. It is being

6 withdrawn as an exhibit.

7 MS. WALLMAN: Yes.

8 JUDGE SIPPEL: All right. And

9 what is it numbered again?

10 MR. MILLS: I don't object to

11 that --

12 (Laughter.)

13 JUDGE SIPPEL: No, I --

14 MR. COHEN: -- surprisingly.

15 MR. SOLOMON: Your Honor, may I

16 ask --

17 JUDGE SIPPEL: Go ahead, Mr.

18 Solomon.

19 MR. SOLOMON: -- just the status

20 of other exhibits that --

21 JUDGE SIPPEL: Well, what is that

22 number? I am sorry, sir.

1 MR. COHEN: 19.

2 JUDGE SIPPEL: 19. Okay. That is
3 withdrawn. I am sorry. Go ahead, Mr.
4 Solomon.

5 MR. SOLOMON: If there are other
6 WealthTV exhibits that you reserved on and --

7 JUDGE SIPPEL: There must be.

8 MR. SOLOMON: Yes, there were. I
9 assume those are not received into evidence,
10 if she hasn't moved --

11 JUDGE SIPPEL: No, no.

12 MR. SOLOMON: -- them received
13 into evidence.

14 JUDGE SIPPEL: No, they are not.

15 MR. SOLOMON: Thank you, Your
16 Honor.

17 JUDGE SIPPEL: They are not coming
18 in until we do just what we did.

19 MR. SOLOMON: Thank you.

20 JUDGE SIPPEL: So that is up to --
21 that is up to the proffer -- the person
22 proffering the exhibit to do that, to bring it

1 back up again. It is not for me to do it.

2 Okay. So you are proffered for
3 cross examination.

4 MR. COHEN: Your Honor, would you
5 like to -- we obviously have -- we have a very
6 lengthy -- it was a very lengthy statement.
7 We have a very lengthy cross. I am perfectly
8 prepared to start now, and I am perfectly
9 prepared to start in the morning. It is
10 totally up to Your Honor.

11 JUDGE SIPPEL: Well, what is it,
12 4:30?

13 MR. COHEN: Yes, Your Honor.

14 JUDGE SIPPEL: Well, I am prepared
15 to go until 5:30.

16 MR. COHEN: Then, I am prepared to
17 start.

18 JUDGE SIPPEL: And does anybody
19 have any serious problem with that or --

20 (No response.)

21 The declarations and other --

22 MR. COHEN: Yes, I will deal with

1 that in the course of cross.

2 JUDGE SIPPEL: Yes, I am sure you
3 will. Okay. Is that okay? The Reporter,
4 everybody is --

5 MR. COHEN: Can you give us a
6 moment to set up here, Your Honor?

7 JUDGE SIPPEL: How much time do
8 you need?

9 MR. COHEN: Three minutes.

10 JUDGE SIPPEL: We don't do three
11 minutes.

12 MR. COHEN: Five minutes?

13 JUDGE SIPPEL: We do -- no, we
14 will do a little more, close to 10 minutes.
15 All right?

16 MR. COHEN: Thank you, Your Honor.

17 (Whereupon, the proceedings in the
18 foregoing matter went off the
19 record at 4:35 p.m. and went back
20 on the record at 4:45 p.m.)

21 JUDGE SIPPEL: Mr. Herring, you're
22 still with us. You're still under oath, but -

1 - you understand what we're going to do.
2 We're going to do an hour of your cross
3 examination and then we're -- then you can go
4 out and get a bite to eat and get a good
5 night's sleep and we're going to come back in
6 the morning and do some more.

7 THE WITNESS: Sounds very good,
8 Your Honor.

9 JUDGE SIPPEL: And we are going to
10 close the door and ask the reporters to leave
11 at this point because we're going into
12 apparently some confidential things.

13 MR. COHEN: Yes, sir.

14 JUDGE SIPPEL: Now we're back on
15 the record.

16 Ms. Wallman?

17 MS. WALLMAN: Just one preliminary
18 thing. Your Honor had indicated on Monday, I
19 believe, that there would be permissible for
20 an expert to update testimony and I believe
21 Your Honor's remarks indicated that they could
22 do it on the stand.

1 We're going to serve, and I raise
2 this now, confident there will be an
3 objection, but we're going to be updating the
4 testimony of Mark Kersey and we're going to
5 serve that tonight.

6 JUDGE SIPPEL: All right.

7 MR. COHEN: Your Honor, should we
8 argue about it --

9 JUDGE SIPPEL: No, I'll take a
10 look at it first.

11 MR. COHEN: I'll just say, can I
12 just set the table? Mr. Kersey did a
13 declaration in February of 2008, if memory
14 serves. That declaration was submitted as an
15 expert report on February of 2009 verbatim.

16 He was deposed on March 30th is my
17 recollection, no, not March 30th --

18 MS. WALLMAN: No, you're correct.

19 MR. COHEN: March 30, 2009 by me
20 and by some others in the room. There are
21 problems with his testimony.

22 On April 6th, Wealth submitted

1 precisely the same declaration that had been
2 submitted in 2008 as part of the
3 administrative proceeding below. In 2009,
4 when expert reports were called for and now on
5 April 6, 2009.

6 The time to update was prior to
7 April 6, 2009 when the written direct
8 testimony was to be filed, not to go back to
9 his office, think about the deposition, submit
10 again under oath precisely the same testimony
11 and come in with an update at 4:50 for
12 informed benefit of first time on the third
13 day of the trial.

14 I can't imagine anything that he
15 would say that would be permissible.

16 JUDGE SIPPEL: Well, let's see.
17 Let's see what it says.

18 Do you want to respond to the
19 litany of the dates that Mr. Cohen has laid
20 out?

21 MS. WALLMAN: Yes. I would have
22 provided it sooner if I had it. I have it

1 now.

2 JUDGE SIPPEL: When did you know
3 he was doing it, he was working on it?

4 MS. WALLMAN: After I finished
5 doing the work for -- that was due on April
6 6th, I was able to turn to it. It's not Your
7 Honor's problem, it's mine in terms of the
8 resources that we have to devote to these
9 issues and had I been able to organize it
10 sooner, I certainly would have provided it
11 sooner.

12 JUDGE SIPPEL: I mean there wasn't
13 even a heads up, given that by the way, we're
14 working on this and here are the areas that
15 we're working on to see -- I mean to try and
16 somehow or other to pat down the shock factor
17 of this?

18 You've explained it as best you
19 can. Bring it in. We'll take a look at it
20 and we'll -- I'm sure we'll have a very low-
21 key discussion about it.

22 (Laughter.)

1 MS. WALLMAN: Yes, Your Honor.

2 JUDGE SIPPEL: And decide what to
3 do.

4 MR. COHEN: Your Honor, just for
5 the record, I won't go into it now, but
6 certainly Comcast finds that objection, given
7 the timing of the submission.

8 JUDGE SIPPEL: Can you get that to
9 counsel?

10 MS. WALLMAN: It's in the process
11 of being finalized and it will be served
12 tonight?

13 JUDGE SIPPEL: All right. Now
14 we're into cross examination. Who is going
15 first?

16 MR. COHEN: I am, Your Honor.

17 CROSS EXAMINATION

18 BY MR. COHEN:

19 Q Good afternoon, again. Mr.
20 Herring, there was some testimony a little bit
21 in your direct about the various kinds of
22 agreements that WealthTV has don e with

1 distribution partners. Do you recall that?

2 A I do.

3 Q And I think you were in the
4 courtroom during the document admission
5 session. Are you comfortable with the term
6 affiliation agreement?

7 A I am.

8 Q And an affiliation agreement is
9 the formal agreement by which you on behalf of
10 WealthTV or WealthTV and a cable operator or
11 a satellite operator or a telco enter into an
12 arrangement for carriage of WealthTV. Is that
13 so?

14 A I would agree with that, except
15 whatever form the agreement is, it's an
16 affiliation agreement. Sometimes there are
17 short forms, long forms, different shapes and
18 sizes.

19 Q And sometimes they're your forms
20 and sometimes they're the carrier, the
21 distributor's forms, correct?

22 A Yes.

1 Q And you have a short form and a
2 long form of your own?

3 A We have various forms, including a
4 short and a long.

5 Q And if I looked at one that was
6 actually on WealthTV letterhead, would that
7 tell me that that was your form?

8 A No.

9 Q Okay. Let me see if I can show
10 you -- are you aware, sir, that you actually
11 have an affiliation agreement with an entity
12 called Insight Communications?

13 A Yes.

14 Q And let me show you what's been
15 received as Exhibit 10 in evidence. Time
16 Warner Cable 10.

17 Ms. Wallman, can I count on you to
18 turn the pages?

19 JUDGE SIPPEL: This is Time Warner
20 10. It's in the record. Is that correct?

21 MR. COHEN: Yes, Your Honor.

22 BY MR. COHEN:

1 Q Now it's marked, Mr. Herring, in
2 the order in which the pages were produced to
3 us, but I think the affiliation agreement
4 probably starts on what we've marked as Time
5 Warner Cable 10-2, the second page. Right,
6 sir?

7 A I'm sorry, was there a question?
8 I didn't hear it.

9 Q Yes. The affiliation agreement
10 actually begins on the second page of the
11 exhibit, does it not?

12 A I would agree.

13 Q And is that actually your
14 handwriting up on the top, original
15 corrections?

16 A It is my handwriting.

17 Q And can you look by this file of
18 the WealthTV and tell us whether this is an
19 agreement that you prepared?

20 (Pause.)

21 A I believe it was a WealthTV-
22 generated agreement. I'm not positive, but I

1 believe that to be true.

2 Q And you signed it on behalf of
3 WealthTV, did you not?

4 A I'd have to look. I don't recall.

5 Q Why don't you look?

6 A My signature is on it.

7 Q Now this agreement is what's known
8 in the industry as a hunting license, is it
9 not?

10 A Yes. I think I've heard hunting
11 license.

12 Q And just so we're clear and so the
13 record is clear, what's your understanding of
14 a hunting license?

15 A My understanding of a hunting
16 license is an affiliation agreement that
17 doesn't come with or isn't associated in any
18 way with launches that are taking place when
19 the agreement is signed, but basically the
20 right to solicit systems of a cable operator,
21 because there's a master agreement with terms
22 and conditions specified.

1 Q And again, just at the beginning
2 if we do some terms, maybe it will be of
3 assistance to the Court, so Insight, like the
4 Defendants, is a multi-system operator?

5 A Yes.

6 Q And it has various systems in
7 various locations, correct?

8 A Yes.

9 Q And it has a corporate
10 headquarters, right?

11 A Yes.

12 Q And you entered into a hunting
13 license with the corporate headquarters which
14 gave you the right to solicit agreements with
15 the individual systems, correct?

16 A That's the general theory, yes.

17 Q I'm not trying to hold to -- I'm
18 trying to be as simple as I can. Generally,
19 that's right?

20 A Yes.

21 Q And if we look at paragraph of
22 Exhibit 10, I think it confirms what you said.

1 It says network hereby grants to affiliate and
2 affiliate hereby accepts the non-exclusive
3 right and license, but not the obligation
4 during the term to distribute the linear
5 service. Do you see that at the beginning of
6 Section 2?

7 A I do.

8 Q And what that means is the
9 affiliate here, again -- it will be easier if
10 we do this once and we can go through them
11 quicker, the affiliate is Insight, correct?

12 A Yes.

13 Q And the network is WealthTV?

14 A Yes.

15 Q And what this means is that
16 Insight has the right to carry WealthTV on its
17 various systems, but no obligation to put it
18 up on any system, right?

19 A That's correct.

20 Q And this is an agreement that you
21 signed in 2005?

22 A I believe so.

1 Q And could you tell us how many
2 Insight systems have agreed to carry WealthTV
3 since you signed this agreement?

4 A Zero.

5 Q Is it fair to say that's a
6 disappointment to you?

7 A It's disappointing, but it's
8 understood why.

9 Q But it's disappointing, right?

10 A It's always disappointing when we
11 don't get carriage. No doubt about that.

12 Q And you've had other
13 disappointments, have you not in attempts to
14 get carriage?

15 A Not like this. This is unique.
16 This is the only agreement out of all the
17 agreements that there is not a single launch
18 associated with it. So when you say other
19 disappointments, I think that's what you're
20 referring to. Sure, I've had disappointments
21 in life, in business, and in everything else.

22 Q I'm not asking about

1 disappointments in life. But you've had --
2 and in fact, there are a whole bunch of
3 systems we're going to talk about later where
4 you've tried to get carriage and you've been
5 unsuccessful completely, correct?

6 A Oh, absolutely.

7 Q And a lot of those, in fact, all
8 of them, except for these four Defendants, are
9 not affiliated in any way with iN DEMAND,
10 right?

11 A The other ones are not affiliated
12 with iN DEMAND. I believe that to be true.
13 Only these four Defendants.

14 Q Now, sir, the description of
15 service, paragraph three, 10-3 of Time Warner
16 Cable 3?

17 A Yes.

18 Q That's something that's typically
19 in your agreements, correct, in many of your
20 agreements?

21 A We actually -- it's in some of our
22 agreements, yes.

1 Q And the description of service is
2 where WealthTV describes what it is, right?

3 A I think that might mischaracterize
4 what we try to do here.

5 Q How so?

6 A Generally, we try to keep the
7 descriptions as broad and general as possible
8 to give the network flexibility and not be
9 held -- not have our feet held to the fire, so
10 if there's any deviation.

11 Q But you said in your written
12 direct testimony that WealthTV is a network
13 that's targeted at an upscale male demographic
14 25 to 49, correct?

15 A Male skewed, 25 to 49, yes.

16 Q Could we put up, just so it would
17 be a little bit easier to see the description
18 of the service in the agreement that you
19 signed?

20 And would you look, sir, at
21 paragraph 3 of Time Warner Cable 10? I don't
22 know if this is going to be better or worse.

1 It may be better.

2 JUDGE SIPPEL: Okay, this is --

3 MR. COHEN: This exhibit, Your
4 Honor. I'm just blowing up paragraph 3.1 on
5 page 10-3.

6 JUDGE SIPPEL: How come you didn't
7 like it when Ms. Wallman did this and you're
8 doing the same thing?

9 MR. COHEN: This is in evidence,
10 Your Honor. And this is this witness's
11 document.

12 JUDGE SIPPEL: All right, never
13 mind.

14 BY MR. COHEN:

15 Q The way that you described your
16 system, Mr. Herring, your service, you said
17 that the linear service is and throughout the
18 term shall be professionally produced, 24 hour
19 per day, 7 day per week, linear lifestyle and
20 entertainment programming service distributed
21 in a high definition format and also
22 distributed in a standard definition digital

1 format, consisting primarily of entertainment
2 and informational programming, designed to
3 appeal to a broad audience by providing
4 viewers with entertainment programming,
5 focused on the lifestyles of the wealthy and
6 information programming about wealth creation,
7 distribution and philanthropy.

8 Do you see that, sir?

9 A I do.

10 Q And that was a correct description
11 of your service, correct?

12 A It's a very broad, general
13 description, yes.

14 Q Is there anywhere in this
15 description that you describe WealthTV as a
16 male-skewed network?

17 A No, there is no description of
18 that in there.

19 Q And you're not contending, are
20 you, sir, that programming designed to appeal
21 to a broad audience is the same thing as
22 saying you're trying to appeal to a male-

1 skewed demographic?

2 A We try to leave these descriptions
3 as broad as possible.

4 Q And that description is accurate
5 about your service, is it not?

6 A I think it's broad enough that
7 it's accurate about our service.

8 Q Have you ever entered into an
9 affiliation agreement where you described your
10 network as a male-skewed network?

11 A I wouldn't do that, no.

12 Q So the answer is no?

13 A The answer is no.

14 Q Let me show you another agreement,
15 sir.

16 (Pause.)

17 One that you signed with GCI.

18 JUDGE SIPPEL: I'm sorry, I didn't
19 mean to say you can't use them. I'm just
20 curious --

21 BY MR. COHEN:

22 Q Sir, let me show you what's been

1 received in evidence as Cox Exhibit 77.

2 And again, this is another
3 agreement that you signed with another cable
4 system, correct?

5 A It is.

6 Q And, in fact, this is an agreement
7 that was prepared by WealthTV?

8 A I think it was.

9 Q And it bears your signature on
10 page 13 of the document?

11 A Yes. And you have a description
12 of the service in here as well, correct?

13 A I'd have to look through it.

14 Q Do you want me to point it to you?

15 A Section 3 was the last one, so.

16 Q Section 3.1. You described
17 WealthTV as lifestyle, entertainment, and
18 informational programming designed to appeal
19 to a broad audience.

20 Do you see that, sir?

21 A I do.

22 Q You didn't describe it as

1 appealing to a male-skewed audience, did you?

2 A No.

3 Q You didn't describe it as
4 appealing to a subset of a male-skewed
5 audience?

6 A No.

7 Q Let me show you an agreement you
8 signed with VOOM. Do you remember entering
9 into an affiliation agreement with VOOM?

10 A Yes.

11 JUDGE SIPPEL: Is this also a
12 hunting license, by the way?

13 MR. COHEN: No, Your Honor. This
14 is a carriage agreement.

15 JUDGE SIPPEL: Thank you.

16 BY MR. COHEN:

17 Q The remainder that I'm going to
18 show you, at the moment, next several are not
19 hunting licenses.

20 This has been marked in evidence
21 as Cox Exhibit 75.

22 And VOOM, just so we're clear was

1 a satellite service that was a competitor to
2 DIRECTV and Echo Star for a short period of
3 time, right?

4 A Yes.

5 Q And in fact, you negotiated this
6 license with VOOM with your programming expert
7 you're going to proffer in this case, Sandy
8 McGovern, Ms. McGovern, correct?

9 A I recall having discussions with
10 three people and -- including Sandy, but the
11 last version of the agreement was mainly done
12 with Lew Scharfbergr. Sandy is part of the
13 team.

14 Q And again, this is an agreement
15 you signed on the last page?

16 A Yes. I see my signature.

17 Q And did you describe WealthTV in
18 this affiliation agreement as a male-skewed
19 network going to a 25 to 49 year old
20 demographic?

21 A No, we never specified age or skew
22 in any of these agreements.

1 Q Do you know how you did it?

2 A Yes, in general, we try to leave
3 it as vague as possible so somebody doesn't
4 hold our feet to the fire that we're in
5 violation of the agreement.

6 Q And what would happen if you're in
7 violation of the agreement?

8 A They could use it as an excuse or
9 if there's a radical change, it's a change in
10 the programming.

11 Q And that means it's important, is
12 it not, to be accurate in describing your
13 programming in these agreements?

14 MS. WALLMAN: Objection,
15 mischaracterizes his testimony.

16 JUDGE SIPPEL: Well, it's cross
17 examination. Do you understand that question?

18 THE WITNESS: I think, in general,
19 I understand it. Yes.

20 JUDGE SIPPEL: All right, try to
21 answer it and see.

22 THE WITNESS: It's important to be

1 as accurate as possible. The description was
 2 left vague on purpose as a strategy to ensure
 3 that there weren't issues, contractual issues
 4 which happen with programming services in
 5 cable companies sometimes as an excuse during
 6 negotiations and threats. So we've left it as
 7 general as possible.

8 BY MR. COHEN:

9 Q And you've understood as the had
 10 of WealthTV that if you violated the
 11 description of programming in your affiliation
 12 agreements the distributor might seek to
 13 terminate the carriage, right?

14 A I'm aware of that.

15 Q And that's one of the reasons why
 16 you try to give yourself some wiggle room?

17 A Absolutely.

18 Q But you didn't describe yourself
 19 here as a male-skewed network, did you?

20 A No.

21 Q Let me show you another exhibit,
 22 sir. Time Warner Exhibit 114 which is a

1 series of documents which has been represented
2 to us as your agreement with AT&T.

3 This is a document that has not
4 been previously marked.

5 JUDGE SIPPEL: It has not?

6 MR. COHEN: No, Your Honor.

7 JUDGE SIPPEL: This is a new one?

8 MR. COHEN: It's a new one for
9 cross examination.

10 JUDGE SIPPEL: So it's --

11 MR. COHEN: Time Warner Cable
12 Exhibit 114 for identification.

13 JUDGE SIPPEL: It's identified as
14 TWC 114. How many pages? It looks like from
15 596 to 622.

16 (Whereupon, the above-referred to
17 document was marked as TWC Exhibit
18 114 for identification.)

19 MR. COHEN: Yes, Your Honor.

20 BY MR. COHEN:

21 Q Do you recognize Time Warner Cable
22 114 as the affiliation agreement you did with

1 SBC, the predecessor of AT&T?

2 A I recognize the agreement. I
3 don't know if it's the most current agreement.

4 Q It's the one that you produced,
5 sir. Do you have a more current one that you
6 haven't produced?

7 A Yes, I just don't recall. We have
8 quite a few distribution agreements.

9 Q Look at page TWC 114-10. Look at
10 description of service. Let me know when
11 you're there. Do you see that?

12 A I do.

13 Q You say the service programming is
14 designed to have broad appeal to allow viewers
15 to enjoy the American dream with compelling
16 shows on travel, fine foods, high fashion,
17 luxurious experiences, and items. Do you see
18 that, sir?

19 A I do.

20 Q And high fashion shows are
21 consistent, in your view, with a male-skewed
22 network, page 25 to 49?

1 A It can be.

2 Q And your understanding is that
3 your fashion shows are male skewed?

4 A If you watched our fashion shows
5 with very few words and a lot of runway
6 action, I think you would agree that that
7 shows is male-skewed.

8 Q Don't you try to avoid the bikinis
9 and flash and that kind of stuff on your
10 network?

11 A Generally, we try to ensure that
12 that doesn't exist. There is some programming
13 that -- Fashion Runway is a great example,
14 that it has fashion runway with not a lot of
15 dialogue.

16 Q Is that the only fashion show you
17 have?

18 A No, there's other fashion shows.

19 Q How many other fashion shows do
20 you have?

21 A Not many.

22 Q You must know the name. You're

1 the president of the company.

2 A If I knew the name of every single
3 show, that would be wonderful, but our library
4 has 2,000 plus different titles.

5 Q I'm not asking for the episode
6 titles. You don't know the name of the
7 fashion series on your own network?

8 A I don't recall what it is.

9 Q You can't name a single one for me
10 other than Fashion Runway?

11 A We don't have many.

12 Q Do you have Chic?

13 A Oh Chic.

14 Q How about What to Wear?

15 A What to Wear, we do have.

16 Q Any others? Or do you need some
17 help?

18 A Chic just wasn't defined. I think
19 that's a misproper categorization of Chic.

20 Q And was this your way in the
21 description of service of saying that this is
22 a male-dominated network?

1 A No, we weren't trying to identify
2 specific information, trying to keep it
3 general.

4 Q Is it accurate that WealthTV, as
5 this agreement says, is designed to have a
6 broad appeal?

7 A WealthTV has a broad appeal.

8 Q Across all ages, correct?

9 A No. I don't believe that to be
10 true.

11 Q What about across all genders?

12 A I don't believe that to be true.

13 Q So when you say broad appeal,
14 you're saying men?

15 A No.

16 Q Is broad appeal your way of saying
17 that your network is targeted at men?

18 A No.

19 Q And broad appeal means something
20 different than men, does it not?

21 Q Broad appeal means something
22 different, yes.

1 Q And broad audience in the prior
2 affiliation agreements means something other
3 than men, correct?

4 A I'm sorry, can you repeat that?

5 Q Yes, let me. It was a bad
6 question. In the prior affiliation agreements
7 that we looked at where you described your
8 target audience as a broad audience, that does
9 not mean men, correct?

10 A It's a generic description and I
11 believe we have an audience that is made up of
12 men with a wide age group, 25 to 49, which
13 spans 25 years. It's a broad audience.

14 Q When you say in your affiliation
15 agreements that your network is aimed at a
16 broad audience, are you relating it only to
17 men?

18 A No.

19 Q And the way you have described
20 your network in these affiliation agreements,
21 these foundational documents, is as a network
22 that has a broad audience, correct?

1 A We use the term broad audience,
2 yes.

3 Q And it has broad appeal, correct?

4 A Yes.

5 Q And there's not a single
6 affiliation agreement that you have ever
7 signed that says that WealthTV is a network
8 designed primarily at men, isn't that so?

9 A No, we try --that's correct. We
10 try to keep it as vague as possible.

11 Q Now do you remember, you mentioned
12 Donna Thompson --

13 JUDGE SIPPEL: What are you going
14 to do with this?

15 MR. COHEN: Thank you, Your Honor.
16 That was very sloppy of me. I would offer
17 Time Warner Cable 114 into evidence.

18 JUDGE SIPPEL: Is there any
19 objection?

20 MS. WALLMAN: No, objection, Your
21 Honor.

22 JUDGE SIPPEL: Thank you. It's

1 received as Time Warner's 114.

2 (The document, having been marked
3 previously for identification as
4 TWC Exhibit 114, was received in
5 evidence.)

6 BY MR. COHEN:

7 Q You mentioned Donna Thomas in your
8 testimony, do you remember that, sir?

9 A Yes.

10 Q And she was your first head of
11 affiliate relations?

12 A Yes.

13 Q You terminated her?

14 A I don't believe that to be true.

15 Q She left the company at some
16 point?

17 A She left the company.

18 Q And there was some litigation
19 between Herring Broadcasting and Ms. Thomas?

20 A There was.

21 Q And you were actually deposed in
22 that litigation, were you not?

1 A I don't recall. I may have been.

2 Q Let me see if I can refresh your
3 recollection.

4 MR. COHEN: Your Honor, do you
5 want me to put a sticker on this deposition
6 transcript or can I just use it?

7 JUDGE SIPPEL: If he's comfortable
8 with it, the way you want, the traditional use
9 of it, just read from it and give him a copy.

10 MR. COHEN: Of course, I'll give a
11 copy.

12 JUDGE SIPPEL: Let's see how far
13 you get with it.

14 BY MR. COHEN:

15 Q Mr. Herring, I'm handing you the
16 second day of your deposition in a case called
17 Donna Thomas versus Herring Broadcasting and
18 the deposition was taken on January 18, 2007,
19 but it's actually a certified copy of the
20 transcript that was obtained from a reporter.

21 Does that refresh your
22 recollection that you were deposed in that

1 case?

2 A I must have been. I don't recall
3 it.

4 JUDGE SIPPEL: This is a case in
5 the Superior Court in the State of California.

6 MR. COHEN: Yes, sir.

7 JUDGE SIPPEL: County of San
8 Diego. Central Judicial District.

9 BY MR. COHEN:

10 Q Mr. Herring, you were deposed for
11 three days. You don't recall it?

12 A I attended a lot of depositions,
13 but I was clearly deposed.

14 Q Would you like me to show you
15 volumes 1 of 3 or would you take my word for
16 it that you were deposed for three days? I'll
17 show it to you if you would like?

18 A I don't think there's a need to.
19 I understand.

20 Q And you don't remember this
21 deposition in early 2007?

22 A I have a memory, I think, of the

1 deposition. I just don't recall a bunch of
2 information.

3 Q Didn't you testify under oath in
4 this deposition that the programming of
5 WealthTV appeals to people 25 to 60?

6 A If it's in here, I must have
7 deposited it.

8 Q I don't want you to take my word
9 for it, sir. So we'll look at this together.
10 Turn to page 257 of your deposition taken in
11 Thomas versus Herring Broadcasting on January
12 18, 2007. And I'm specifically directing you
13 to page 257, line 4.

14 Question: Who are those people?
15 Describe them for me. What age bracket?

16 Generally, our programming appeals
17 to about a 25 to 60 plus crowd. We don't
18 appeal to children or have a special appeal to
19 children. We don't have cartoons. We don't
20 have any other educational, other types of
21 programming that's more in line with in
22 general question, children like to watch.

1 Do you remember being asked that
2 question, who are those people and giving that
3 answer?

4 A I do not.

5 Q Is this testimony untrue?

6 A It would need to be clarified,
7 because I think there's -- and I've always
8 thought that slide shows it. There's two
9 audiences that I think Wealth appeals to.
10 There's the core audience that we appeal to,
11 but when we produce shows on cars, for
12 example, even though we're trying to hit a 25
13 to 49 year old, I can tell you they are going
14 to get a broader audience. We've noted that.
15 We pick up a broader audience and it skews
16 towards the older age group. If you look at
17 the reports, they're not exhibits, but the
18 information that I have seen, the audience
19 doesn't skew younger. We don't have 17 and 18
20 year olds. If anything, it skews towards the
21 higher end.

22 Q Is it true, sir, as you testified

1 under oath in your deposition on January 18,
2 2007, that your programming appeals to about
3 25 to 60 plus crowd?

4 A I know --

5 Q Can you answer that yes or no, if
6 you can?

7 A I believe our programming does
8 appeal to a 25 to 60 crowd.

9 Q Turn, please, to page 258 of the
10 deposition. You were asked a series of
11 questions and I'll invite you to look anywhere
12 on 257, 258, but you were asked on 258, line
13 8.

14 Question: Mr. Herring, here's
15 what I see you have indicated to me, that your
16 programming appeals to people 25 to 60, people
17 who like substance in their programming,
18 people who like to think, people who like
19 entertainment with a take-away value, people
20 who enjoy traveling, enjoy thinking, have an
21 open mind. Is there anything else that you
22 would like to add to the demographics of the

1 people who like WealthTV?

2 Answer: Some of the programming
3 has a vicarious aspect to it. Do you see
4 that, sir?

5 A Yes.

6 Q Did you mention that your
7 programming appeals to men?

8 A No.

9 Q In response to the open-ended
10 question "is there anything else?" You left
11 out men, correct?

12 A I didn't specify men or women.

13 Q Correct, but you were asked --
14 what does demographic mean to you, sir? Is
15 gender a demographic, do you understand that?

16 A I believe gender is a make up of a
17 demographic.

18 Q And when you were asked an open-
19 ended question, is there anything else that
20 you would like to add to the demographics, you
21 didn't mention men, did you?

22 A I did not.

1 Q Why don't you keep reading to
2 yourself on 258 and 259? And tell me, as
3 you're asked follow-up question after follow-
4 up question whether you ever mentioned in
5 connection with the demographics of your
6 network that it appeals to men?

7 (Pause.)

8 A I don't see anything in here.

9 Q In fact, you said the only people
10 who wouldn't like WealthTV are monks who have
11 taken a vow to poverty, correct?

12 A Yes. Well, I don't see it, but I
13 know I've made that statement before.

14 Q So in response to multiple
15 questions at deposition, what you said was
16 that your demographic was 25 to 60, and you
17 didn't specify men, correct?

18 A If that's what this says, I'd have
19 to read through it. I don't have a clear
20 recollection of this deposition.

21 Q Even though it was a deposition
22 and there was a hearing, you understood you

1 were under oath, did you not?

2 A Oh, I definitely understood that.

3 Q And the fact that you were
4 videotaped, you understood that, correct?

5 A I have -- I watched a lot of
6 depositions in this proceeding and I vaguely
7 recall this. But that's about it.

8 Q But in response to these open-
9 ended questions, you didn't think to mention
10 men, right?

11 A No, I didn't mention men.

12 Q And here, your testimony is that
13 the principal defining demographic of your
14 network is 25 to 49 year old men, isn't that
15 so?

16 A That's what it's targeted at.

17 Q Did you mention that here?

18 A No, apparently not.

19 Q And you answer in response to a
20 question on page 259, you say about your
21 programming, it has a family-friendly appeal.
22 If somebody is looking for a lot of flesh or

1 a lot of bikinis or flesh, we really try to
2 avoid that component.

3 A We do.

4 Q You do?

5 A Yes.

6 Q Didn't you submit as
7 representative of your programming in this
8 case women in scantily clad bikinis for the
9 purpose of trying to demonstrate that you
10 appeal to men?

11 A There's programming on WealthTV
12 that airs late in the night. Envy is a great
13 example of it, that is not family friendly.
14 We try to make sure that when somebody is
15 watching during what I would call normal
16 viewing hours that the programming is family
17 friendly, although it's not geared towards
18 young family members.

19 Q Isn't it true that your
20 programming is family friendly?

21 A Again, I'll reiterate exactly what
22 I said. We try to ensure that our programming

1 is family friendly during normal viewing
2 hours. One of our shows, Envy, will only air
3 during certain times when you look at the
4 schedule because we're worried about the
5 content that's on Envy as far as being family
6 friendly.

7 Q Do you know what the TV ratings
8 are, do you know what TV-14 is?

9 A I know what TV-14 is, in general.

10 Q And would you agree with me that
11 programming that is rated more restrictively
12 than TV-14 is not family friendly?

13 A I would argue that even TV-14 is
14 not family friendly. I see a lot of
15 programming that I just don't think should be
16 on air in prime time.

17 Q Let me show you what your counsel
18 has marked and had entered into evidence as
19 Exhibit 10. It's a picture, a screen shot for
20 Fashion Runway.

21 A Yes.

22 Q Did you actually personally make

1 these screen shots for your lawyer?

2 A I did not.

3 Q Did you have it done at your
4 direction?

5 A I knew it was being done for this
6 case. I am not comfortable saying I had it
7 done at my direction.

8 Q And would you agree with me in
9 light of your sworn testimony in the Thomas
10 case that these pictures are not
11 representative of the programming on WealthTV?
12 The pictures in Wealth Exhibit 10?

13 A We rarely will show images like
14 that. Are there images like that on WealthTV?
15 Absolutely, and Envy is a prime example. And
16 it airs at an appropriate time slot, so it's
17 not seen, hopefully not seen by younger family
18 members.

19 Q Did I hear you correctly. You
20 said you rarely have programming that looks
21 like this on WealthTV?

22 A We try to avoid programming --

1 well, I wouldn't classify that -- we wouldn't
2 have any nudity. We try to avoid violence.
3 We try to avoid profanity. Even though the
4 programming is targeted at a 25 to 49 year
5 old, we try to avoid having inappropriate
6 images during what I would call normal viewing
7 hours.

8 There is programming -- there are
9 several hours of programming and as an example
10 I offer Envy that has content in it that
11 should not be viewed by family members.

12 Q This is not from Envy. This is
13 from Fashion Runway, is it not?

14 A Yes.

15 Q Exhibit 10. And isn't it fair to
16 say that this picture, Exhibit 10, is not
17 representative of the look and feel of
18 WealthTV?

19 A There's not a lot of fashion shows
20 to begin with.

21 Q There's not a lot of women in
22 bikinis, is there, Mr. Herring?

1 A No, there's not a lot of women in
2 bikinis.

3 JUDGE SIPPEL: I don't think
4 you've answered his question. Can you answer
5 his question?

6 THE WITNESS: I'll try, Your
7 Honor.

8 MR. COHEN: I'll ask it again,
9 Your Honor.

10 BY MR. COHEN:

11 Q Is Exhibit 10 a picture of four,
12 I'll call them scantily-clad women
13 representative of what we see day in and day
14 out on WealthTV?

15 A It is not.

16 Q Let me show you Exhibit 11 in
17 evidence. Wealth Exhibit 11.

18 Have you looked at this document?

19 A I have.

20 Q Why don't you turn to WealthTV's
21 Let's Shop scenes, episode Rio de Janeiro
22 which is page 2 of WealthTV 11. Do you see

1 that, sir?

2 A I do.

3 Q Page 2 and page 3 and page 4.

4 Those are women in scantily-clad bikinis?

5 A Definitely image two is.

6 Q What's image three, the left side,
7 women in bikinis?

8 A I would say it's a woman in a
9 bikini. I wouldn't say it's a scantily-clad.
10 I would consider it a fairly normal bikini.

11 Q How about page four, how does that
12 look to you?

13 A This looks like a dancer from Rio,
14 scantily-clad though, I would agree with that.

15 Q Let's Shop is a show that's been
16 on WealthTV since 2004?

17 A I believe so.

18 Q How many episodes are there?

19 A I don't know.

20 Q Is it your testimony under oath,
21 Mr. Herring, that these pictures that
22 constitute Exhibit 11 are representative of

1 what we see on your show called Let's Shop on
2 WealthTV in terms of look and feel of the
3 programming? Can you answer that yes or no?

4 A Let's Shop has a lot of bikini
5 scenes in it. But that is not what the show
6 is about.

7 MR. MILLS: Objection, not
8 responsive.

9 MR. COHEN: I was going to ask him
10 if he could answer my question. Thank you,
11 Mr. Millers.

12 JUDGE SIPPEL: I'll sustain the
13 objection. Let's ask -- repeat it.

14 BY MR. COHEN:

15 Q These pictures, if you wanted to
16 describe the look and feel of your show, let
17 me ask it this way, Let's Shop is a shopping
18 show, is it not?

19 A It has a shopping component. It's
20 a travel show seeking the best around the
21 world.

22 Q And you have described it in your

1 marketing materials as a female-skewed show,
2 have you not?

3 A We have.

4 Q Consistently, have you not?

5 A I believe so.

6 Q And in that female-skewed show, is
7 it your testimony, sir, under oath, that these
8 pictures that you submitted into evidence are
9 representative of the look and feel of this
10 series that's been on for five years? Can you
11 answer yes or no?

12 A It's not a complete picture, no.

13 Q It's not representative of what
14 the programming looks like, is it?

15 A It shows a component of the
16 programming.

17 MR. MILLS: Same objection.

18 JUDGE SIPPEL: You're not
19 answering his question.

20 BY MR. COHEN:

21 Q The Judge has asked you answer the
22 question. I've asked you the question four

1 times, Mr. Herring.

2 A No, it's not a complete picture.

3 MR. MILLS: Objection.

4 JUDGE SIPPEL: Wait a minute,

5 that's not the --

6 MR. COHEN: That's not the

7 question.

8 JUDGE SIPPEL: That's not the

9 question.

10 THE WITNESS: I think there's more

11 to the explanation than a simple yes or no,

12 but that is not -- that picture does not

13 describe that show.

14 BY MR. COHEN:

15 Q Correct, but you put it into

16 evidence for the purpose of showing the Judge

17 what Let's Shop looks like, right?

18 A No, to show that there's -- this

19 show has a lot of bikini shots in it.

20 Q Did you put in any other screen

21 shots from Let's Shop other than Exhibit 11?

22 A I think that's the only exhibit.

1 Q So you put in an exhibit of
2 pictures that were not representative of the
3 look and feel of the show, isn't that so?

4 A It's not a description of the
5 show. It's a description of a portion of the
6 show. Some shows look like that, some don't.
7 The majority do not.

8 MR. MILLS: Objection, Your Honor.
9 The question is an important one. It asks
10 whether it's representative. I think Mr.
11 Cohen is entitled to an answer to whether it
12 is representative of the show.

13 THE WITNESS: It does not
14 represent the show.

15 MR. MILLS: Thank you.

16 THE WITNESS: There's more to the
17 show.

18 JUDGE SIPPEL: Thank you.

19 BY MR. COHEN:

20 Q Let's go back to Exhibit 10.
21 You're not testifying under oath, are you,
22 that the show Fashion Runway typically

1 consists of women wearing outfits like the
2 pictures that are shown in Exhibit 10, are
3 you?

4 A No, that wouldn't represent
5 Fashion Runway.

6 Q Because you have given interview
7 after interview in the press in which you have
8 described WealthTV as a family-friendly
9 network, correct?

10 A We try to make sure it's family
11 friendly, yes.

12 Q Isn't that one of the founding
13 principles upon which your father founded this
14 network with you?

15 A We try to ensure that during
16 normal viewing hours all the content is family
17 friendly. That's absolutely true.

18 JUDGE SIPPEL: What are the normal
19 family hours you're talking about? Do you
20 define them?

21 Are they internally defined?

22 THE WITNESS: I hate to say this,

1 but I don't know the definition of family
 2 viewing. I can tell you that 3 p.m. and p.m.,
 3 I consider those family viewing. I don't know
 4 when Envy plays, but it's -- I believe later
 5 in the evening, 11, 12, 1 o'clock because it's
 6 a more risque-type show and we just don't want
 7 kids seeing it that shouldn't see it.

8 JUDGE SIPPET: No kids are up at
 9 11?

10 THE WITNESS: There's kids up at
 11 11. I'm aware of that.

12 BY MR. COHEN:

13 Q So your target demographic shifts
 14 more male, late at night?

15 A No. Just the shows that show more
 16 flesh are maybe inappropriate during certain
 17 times of the day are moved later into the
 18 evening so that -- I use the term normal
 19 viewing hours and I don't have a good
 20 definition for you. But when we think people
 21 are going to be watching TV with children, or
 22 potentially children in the room, these types

1 of shoes, including Envy, would be a prime
2 example, are not on the air.

3 Q The kinds of pictures that are
4 shown in Exhibits 10 and 11, you don't show
5 that during the morning hours on your network,
6 do you?

7 A I don't believe so.

8 Q And you don't show it during the
9 afternoon hours on your network, do you?

10 A We do not.

11 Q And you don't show it during prime
12 time, on your network, do you?

13 A Maybe late, late prime time. I
14 know there's a lot of definitions of prime
15 time, but not 8, 9 pm. type stuff.

16 It's moved out of the normal
17 schedule because of the type of images that
18 are seen on those shows.

19 Q So isn't it fair to say, Mr.
20 Herring, that if we, without the benefit of
21 watching your network, were trying to get an
22 idea of the look and feel of your network, we

1 wouldn't get it from Exhibits 10 and 11, would
2 we?

3 A No, you wouldn't get it from those
4 images, not at all.

5 Q Well, sir, you've made
6 presentations to Time Warner Cable --

7 MR. COHEN: Your Honor, it's 5:30.
8 I don't know -- I'm going to a slightly
9 different line.

10 JUDGE SIPPEL: Are you?

11 MR. COHEN: Yes.

12 JUDGE SIPPEL: Why don't we wait
13 until tomorrow. Is that okay? Does everybody
14 agree with that?

15 I mean nobody has a problem with
16 that? Okay, we're in recess until 9:30?

17 MR. COHEN: May I ask a question,
18 Your Honor? I don't know what your practice
19 is with respect to the witness having
20 discussions.

21 JUDGE SIPPEL: Don't talk to
22 anybody, not to talk to any fact witnesses. He

1 can talk to his attorney. Do you understand
2 what I mean?

3 THE WITNESS: I do, Your Honor.

4 MR. COHEN: About the substance of
5 the testimony? That's what I was asking,
6 whether you ever ruled that he may not talk
7 about the substance of the testimony while
8 he's on cross examination.

9 JUDGE SIPPEL: With his lawyer?

10 MR. COHEN: Yes, Your Honor.

11 MR. MILLS: My understanding is --

12 JUDGE SIPPEL: You're right.
13 You're right, you're right, you're right.

14 MS. WALLMAN: Your Honor, for
15 clarification, am I permitted to continue to
16 prepare him for other areas of cross?

17 JUDGE SIPPEL: Of course.

18 MS. WALLMAN: Thank you.

19 JUDGE SIPPEL: All right, yes, of
20 course. You just can't talk about the
21 substance of what he's testified to.

22 MR. COHEN: That's not actually --

1 Your Honor makes the rules. My understanding
2 is when Courts apply the rule it means that
3 there can't be discussions between counsel and
4 the witness while the witness is on cross
5 examination because I should have the benefit
6 of Mr. Herring just continuing straight
7 through. It's just --

8 JUDGE SIPPEL: I see. As though
9 there had been no break.

10 MR. COHEN: Yes, Your Honor.

11 MR. MILLS: And I agree with that,
12 Your Honor. My experience is it's important
13 because otherwise counsel can prepare, based
14 on what's happened so far, can prepare the
15 witness for the rest of the testimony and
16 that's not fair to counsel.

17 JUDGE SIPPEL: Which counsel could
18 not otherwise do --

19 MR. MILLS: If we didn't take a
20 break.

21 JUDGE SIPPEL: If we didn't take a
22 break. I see.

1 I think in this case with this --
2 well, that's a tough one. But I think you're
3 right. That is definitely the practice.

4 I'm going to ask counsel not to
5 talk about the substance of his testimony
6 period. Talk to him about anything that you
7 see as a problem in his technique perhaps or
8 how he's delivering or how he's -- his
9 mannerisms or anything like that, but not the
10 substance of the testimony.

11 MR. MILLS: Thank you, Your Honor.

12 JUDGE SIPPEL: I assume he's
13 already been prepared for cross examination.

14 MS. WALLMAN: He has had some
15 preparation for cross examination.

16 JUDGE SIPPEL: It's a tight line
17 to walk and it's best that I give you a
18 specific instruction, rather than let it slide
19 back and forth, but certainly -- well, I've
20 already given the instruction.

21 MS. WALLMAN: I do understand the
22 specific instruction, Your Honor. It's

1 somewhat of a disadvantage, given our resource
2 situation, but I will certainly abide by your
3 ruling.

4 JUDGE SIPPET: We'll do it to the
5 other side. If I'm going to be strict with
6 you, I'm going to be strict with them. It's
7 a good point. It's a good point because it's
8 the way it's supposed to be done. It's a
9 little bit after 5:30. You've been
10 instructed. We're in recess. 9:30 is our
11 starting time tomorrow. We're recessed until
12 9:30.

13 (Whereupon, at 5:34 p.m., the
14 hearing was adjourned, to reconvene tomorrow,
15 Thursday, April 23, 2009 at 9:30 a.m.)

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